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## Registration or Bust: Supreme Court Resolves Copyright Circuit Split

### **Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC et al.**

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The Supreme Court handed down a judgment resolving an ongoing circuit split and issued a rare black-letter rule, both relieving the uncertainty of the “copyright registration question” and sounding a death knell for those representing plaintiffs in copyright infringement cases based upon unregistered works.<sup>1</sup> In an opinion written by Justice Ginsburg, the Supreme Court held that a copyright claimant can only commence an infringement suit when the Copyright Office registers the copyright with a certificate or denies an application.

This holding is contrary to the view of “application approach” jurisdictions, which allow copyright claimants to file suit once a completed copyright application is filed. Under the application approach, the registration date is the date which a claimant applies for copyright registration; *not* the date the Copyright Office issues the registration certificate.

The impact of the Supreme Court’s decision on copyright claimants boils down to this: file applications for your works in the Copyright Office as soon as they’re eligible for protection or risk delaying a lawsuit against an infringer and losing out on statutory damages and attorney’s fees.

This case arose out of a dispute between Fourth Estate Public Benefit Corporation (“Fourth Estate”), a news organization, and Wall-Street.com, LLC (“Wall-Street”), a news website, after the cancelation of a license agreement between the parties. The agreement provided that Fourth Estate created content and Wall-Street posted the content on its website. Wall-Street was required by the agreement to remove all Fourth Estate content prior to canceling the agreement, but Wall-Street failed to do so. Because of this failure to remove content, Fourth Estate sued Wall-Street for copyright infringement.

Fourth Estate was not granted copyright registration certificates prior to instituting the lawsuit. Instead, Fourth Estate relied on the applications it submitted to the Copyright Office Register as its basis for standing. The District Court dismissed the lawsuit because the Register had not yet acted on Fourth Estate’s applications.<sup>2</sup> The Eleventh Circuit affirmed the dismissal with its unwavering holding that

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<sup>1</sup> *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571, 2019 WL 1005829 (U.S. Mar. 4, 2019).

<sup>2</sup> *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, No. 16-60497-CIV, 2016 WL 9045625 (S.D. Fla. May 23, 2016), *aff’d sub nom. Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017), *aff’d*, No. 17-571, 2019 WL 1005829 (U.S. Mar. 4, 2019).

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“[f]iling an application does not amount to registration.”<sup>3</sup> This approach taken by the Eleventh Circuit has been coined the “registration approach”. The Tenth Circuit had also adopted the registration approach.

On the other side of the circuit split was the “application approach.” This approach held that there is no requirement to file and maintain a copyright infringement action other than having completed and filed a copyright application. Courts adhering to the application approach viewed an application as a formality that will eventually result in either a registration or a rejection of the application, either of which will allow the litigant to proceed. The application approach had been adopted by the Ninth and Fifth Circuits.

The Supreme Court relied upon the legislative history of the Copyright Act in deciding that a copyright claimant must apply for registration *and* receive the Copyright Office’s decision before instituting suit. Once the Register grants or refuses registration, the copyright owner may also seek an injunction barring the infringer from continued violation of its copyrights.

The Supreme Court acknowledged that the waiting period for the Copyright Office to review the registration application deprived the owner of her rights during that interval. But the Court also highlighted that Congress provided a remedy for that deprivation to owners of works especially susceptible to prepublication infringement by allowing preregistration for those certain types of works.

With the Supreme Court’s adoption of the registration approach, the foresight of timely registration becomes critical for creators. Without a copyright registration in hand, creators will be forced to wait—the average wait time for web claims is 6 months—as infringers abuse their works, in addition to potentially losing significant portions of damages awards. With the potential downsides in mind, \$35–\$55 upon creation is a small price to pay to secure the ability to enforce a copyright.

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<sup>3</sup> *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1341 (11th Cir. 2017), *cert. granted sub nom. Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707, 201 L. Ed. 2d 1095 (2018), *and aff’d*, No. 17-571, 2019 WL 1005829 (U.S. Mar. 4, 2019).