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## Statutory Cosmetic Surgery: Misinterpretation of the Copyright Act's Registration Requirement in *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*

### I. INTRODUCTION

In the era of Internet-at-your-fingertips, cars can be registered within minutes online. Instead of mailing registration cards, new electronic products can be registered instantaneously through the Internet. University students can even register for classes at the mere click of a mouse. With such convenience, most people never consider at what point “registration” occurs—that is, whether cars, electronic products, and students are registered when the online forms are electronically submitted or when, milliseconds later, the servers respond by accepting the registration.

However, in the context of copyright registration, this distinction matters. The Copyright Act permits copyright holders to initiate actions for infringement only after the copyright has been “registered” by the Copyright Office.<sup>1</sup> Because the time between submitting an application and having the application acted on by the Copyright Office often runs more than six months,<sup>2</sup> as opposed to the milliseconds in many other registration contexts, it is important for potential plaintiffs to know whether they can bring suit after submitting the application materials, or whether they must wait for the Copyright Office to act. Unfortunately, for some plaintiffs, waiting the more than six months for the Copyright Office to act places them beyond the statute of limitations, thus removing any possibility of recovering for infringement.

In *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*,<sup>3</sup> the Ninth Circuit addressed this very issue, which had already split circuit and district courts across the country. The court, by looking at not only the plain language of the Copyright Act but also the legislative purpose and broader context of the statute, held that the plaintiff's copyright was “registered” at the time it submitted an application to

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1. 17 U.S.C. § 411(a) (2006).

2. U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-what.html#certificate> (last visited Mar. 1, 2011).

3. 606 F.3d 612 (9th Cir. 2010).

the Copyright Office, thus allowing the case to proceed on the merits. This Note disagrees with the Ninth Circuit, instead arguing that it was unnecessary for the court to analyze legislative purpose and the broader context of the statute because the plain language is clear that the Copyright Office must act on an application before it is registered. Thus, the court should have dismissed the claim because it was brought before the copyright was registered.

This Note proceeds as follows. Part II details the facts and procedural history of *Cosmetic Ideas*. Before analyzing the court's opinion in Part IV, Part III outlines the legal background—including the current circuit split—leading up to the court's decision. Part V then analyzes the Ninth Circuit's decision, concluding that the court made significant errors in statutory construction in holding that a copyright is registered at the time the application is received by the Copyright Office. Part VI briefly concludes.

## II. FACTS AND PROCEDURAL HISTORY

This dispute arose between two jewelry retailers: Cosmetic Ideas, Inc., doing business as Sweet Romance Jewelry Manufacturing (“Cosmetic”), and IAC/InterActiveCorp, the parent company of the ubiquitous Home Shopping Network (“HSN”). Cosmetic manufactures and retails costume jewelry designed by artist and historian Shelley B. Cooper and inspired by antique and vintage items.<sup>4</sup> It sells its products through a variety of high-end jewelry retailers, such as Hearst Castle, Canterbury Cathedral, and Fortnum and Mason, as well as on its own website.<sup>5</sup> HSN is a 24-hour-a-day basic cable shopping network reaching over 90 million homes and selling a broad range of products, including clothing, exercise equipment, food and cooking devices, and of course, jewelry.<sup>6</sup>

In 1997, Cosmetic designed a piece of costume jewelry called the “Lady Caroline Lorgnette,” a pendant featuring an acrylic magnifying glass adorned with crystals to simulate jewels.<sup>7</sup> Two years later, Cosmetic began to manufacture and sell copies of the Lady

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4. SWEET ROMANCE JEWELRY, <http://www.sweetromanceonline.com/AboutUs.asp> (last visited Mar. 1, 2011).

5. *See id.*

6. *See* HSN, INC., [http://www.hsni.com/?o=!BNCI0&cm\\_sp=Global\\*BN\\*CompanyInfo](http://www.hsni.com/?o=!BNCI0&cm_sp=Global*BN*CompanyInfo) (last visited Mar. 1, 2011).

7. *See Cosmetic Ideas*, 606 F.3d at 614.

Caroline Lorgnette through its distributors.<sup>8</sup> Cosmetic claims that sometime between 2005 and 2008, HSN began “manufacturing and distributing copies of a ‘virtually identical’ necklace” to the Lady Caroline Lorgnette.<sup>9</sup>

It was not until March 6, 2008 that Cosmetic submitted to the Copyright Office an application for registration of its copyright in the necklace, receiving confirmation of receipt of the application on March 12, 2008.<sup>10</sup> On March 27, 2008, Cosmetic filed a complaint in the Central District of California for copyright infringement, alleging that HSN infringed Cosmetic’s copyright in the necklace by selling necklaces that were virtually identical.<sup>11</sup> The Copyright Office eventually issued a certificate of registration, but not until sometime after Cosmetic had filed the complaint against HSN.<sup>12</sup>

On June 2, 2008, HSN filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the court lacked such jurisdiction over the controversy because Cosmetic had not registered the copyright, as required by the Copyright Act, when it commenced the action in district court.<sup>13</sup> The district court granted HSN’s motion on June 17, 2008, resulting in this appeal to the Ninth Circuit.<sup>14</sup>

### III. SIGNIFICANT LEGAL BACKGROUND

Under the power granted it by the Copyright Clause to regulate copyright protection,<sup>15</sup> Congress passed the Copyright Act of 1976 (“the Act”) to “adopt[] a single system of federal statutory copyright.”<sup>16</sup> This system replaced an “anachronistic, uncertain, impractical, and highly complicated dual system” that provided common law copyrights for unpublished works and Federal statutory copyrights for published works.<sup>17</sup> Under this simplified federal

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. U.S. CONST. art. I, § 8, cl. 8.

16. H.R. REP. NO. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.

17. *Id.*

system, copyright protection begins the moment an original work of authorship is “fixed in any tangible medium of expression.”<sup>18</sup> Thus, registration of a copyright is not necessary to obtain protection.<sup>19</sup>

Nevertheless, to encourage copyright registration and thus a “robust federal register,”<sup>20</sup> Congress predicated the ability to bring suit for copyright infringement on the work first being registered.<sup>21</sup> Accordingly, § 411(a) of the Act provides, “[N]o action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.”<sup>22</sup> In order to avoid the technicalities of previous copyright statutes, however, registration is “a relatively simple . . . process,”<sup>23</sup> requiring only deposit of two copies of the work,<sup>24</sup> an application for registration,<sup>25</sup> and payment of a fee.<sup>26</sup>

Courts, though, are split over what it means for copyright registration to have “been made” under § 411(a)—in other words, when a copyright is “registered.” Some courts hold, under the “application approach,” that a copyright is “registered” when all necessary materials are submitted to the Copyright Office.<sup>27</sup> Other courts, under the “registration approach,” disagree and require the Copyright Office to have acted on the application—which can often take more than six months—before a party can institute an action for copyright infringement.<sup>28</sup>

This debate first arose because many courts treated § 411(a)’s registration requirement as a jurisdictional prerequisite to suit. For

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18. 17 U.S.C. § 102(a) (2006). Under previous copyright statutes, copyright protection was dependent on formalities such as notice, deposit, and registration. H.R. REP. NO. 94-1476, at 147–50 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5763–66.

19. 17 U.S.C. § 408(a) (“Such registration is not a condition of copyright protection.”).

20. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 619 (9th Cir. 2010).

21. 17 U.S.C. § 411(a).

22. *Id.*

23. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1199 (10th Cir. 2005), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

24. 17 U.S.C. § 408(b).

25. *Id.* § 409.

26. *Id.* § 708.

27. *E.g.*, *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386–87 (5th Cir. 1984).

28. *E.g.*, *La Resolana Architects*, 416 F.3d at 1202–03; *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990), *abrogated by Reed Elsevier*, 130 S. Ct. at 1243.

example, the Tenth Circuit in *La Resolana Architects, PA v. Clay Realtors Angel Fire*<sup>29</sup> endorsed the registration approach, upholding the dismissal of a claim for lack of subject matter jurisdiction because it was filed before the Copyright Office acted on the plaintiff's application for registration.<sup>30</sup> The Supreme Court in *Reed Elsevier, Inc. v. Muchnick*,<sup>31</sup> however, abrogated this and other cases, holding that although the "registration requirement is a precondition to filing a claim," it "does not restrict a federal court's subject matter jurisdiction."<sup>32</sup>

Although post-*Reed Elsevier* the registration requirement is not a jurisdictional bar, it remains part of an infringement claim. Thus, the debate between the application and registration approaches continues as courts must determine whether a plaintiff has satisfied all elements of an infringement claim when she has applied for registration but the Copyright Office has yet to act on the application. It is precisely this question that the Ninth Circuit faced in *Cosmetic Ideas*.

#### IV. THE COURT'S DECISION

In *Cosmetic Ideas*, the Ninth Circuit adopted the application approach and held that a copyrighted work is registered at the time the copyright holder's application is received by the Copyright Office.<sup>33</sup> To reach this conclusion, the court performed standard statutory interpretation techniques, beginning by analyzing the plain language of the statute, then looking at the language of the statute as a whole and concluding by considering the broader context and the purpose of the statute (including analyzing its legislative history).<sup>34</sup>

Before addressing the merits of the arguments, the court began by noting that the Copyright Office had acted on *Cosmetic's* application for registration and issued a certificate of registration for the contested necklace.<sup>35</sup> Once a copyright is accepted for registration, the registration dates back to the day on which the

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29. 416 F.3d 1195 (10th Cir. 2005).

30. *Id.* at 1208.

31. 130 S. Ct. 1237 (2010).

32. *Id.* at 1241.

33. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621 (9th Cir. 2010).

34. *Id.* at 616–18.

35. *Id.* at 616.

application, fee, and deposit are first made to the Copyright Office.<sup>36</sup> Thus, the issue of registration as a precondition to suit was moot because the controversy had ended. Nevertheless, the Court decided to address the issue because it was one “capable of repetition yet evading review.”<sup>37</sup> Furthermore, the law across the country was murky and unsettled, and the Ninth Circuit wanted to weigh in.<sup>38</sup>

The court began its statutory analysis by reviewing “the plain language of the statute.”<sup>39</sup> As mentioned previously, the Copyright Act provides, *inter alia*: “[N]o 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.”<sup>40</sup> However, the court found that the Act’s definition of “registration” was wholly unhelpful in interpreting the term.<sup>41</sup>

Because the language of the statute was unhelpful in interpreting the term “registration,” the court continued by dissecting “the language of the statute as a whole to determine the intended meaning.”<sup>42</sup> According to the court, “copyright registration is addressed in five consecutive sections: §§ 408 through 412.”<sup>43</sup> The court conceded that two subsections, “§ 410(a) and portions of 411(a), contain language that suggests that registration requires some affirmative steps to be taken by the Copyright Office.”<sup>44</sup> For example, § 410(a) “places an active burden of examination and registration upon the Register, suggesting that registration is not accomplished by application alone.”<sup>45</sup>

The court went on, though, to argue that “[o]ther sections of the Act . . . cast doubt on this interpretation.”<sup>46</sup> For example, § 408 “favors the application approach,” stating that a copyright owner “may obtain registration . . . by delivering to the Copyright Office”

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36. 17 U.S.C. § 410(d) (2006).

37. *Cosmetic Ideas*, 606 F.3d at 616 (internal quotations omitted).

38. *Id.*

39. *Id.*

40. 17 U.S.C. § 411(a).

41. *Id.* § 101 (“‘Registration’ . . . means a registration of a claim in the original or the renewed and extended term of copyright.”); *Cosmetic Ideas*, 606 F.3d at 616.

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

43. *Id.* at 617.

44. *Id.*

45. *Id.*

46. *Id.*

an application.<sup>47</sup> Additionally, § 411(a) favors the application approach because it permits a plaintiff to bring suit for infringement after it receives a rejection from the Copyright Office, so long as it serves notice on the Register of Copyrights.<sup>48</sup> Other sections, such as § 410(d), however, “could be read as supporting either the application or registration approach.”<sup>49</sup> Thus, the court was “not persuaded that the plain language of the Act [as a whole] unequivocally support[ed] either the registration or application approach.”<sup>50</sup> This ambiguity made it necessary to look beyond the plain language of the statute “to determine which approach better carri[ed] out the purpose of the statute.”<sup>51</sup>

After looking to “the broader context of the statute as a whole” and the purpose of the statute,<sup>52</sup> the Ninth Circuit ultimately concluded that “the application approach better fulfill[ed] Congress’s purpose of providing broad copyright protection while maintaining a robust federal register.”<sup>53</sup> In coming to this conclusion, the court emphasized three policy reasons. “First, the application approach avoids unnecessary delay in copyright infringement litigation, which could permit an infringing party to continue to profit from its wrongful acts.”<sup>54</sup> Second, “the application approach avoids delay without impairing the central goal of copyright registration,” that of maintaining a robust federal register.<sup>55</sup> Last, in addition to inefficiency, the registration approach, in the “worst-case scenario,” is unfair because it causes a party to completely lose its ability to recover for infringement.<sup>56</sup>

Above all, the court emphasized that the application approach “best effectuate[s] the interests of justice and promote[s] judicial economy.”<sup>57</sup> Because a copyright holder could ultimately bring a

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47. *Id.*; 17 U.S.C. § 408(a) (2006).

48. 17 U.S.C. § 411(a).

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

50. *Id.*

51. *Id.*

52. *Id.* (quoting *United States v. Olander*, 572 F.3d 764, 768 (9th Cir. 2009) (internal quotations omitted)).

53. *Id.* at 619.

54. *Id.*

55. *Id.* at 620.

56. *Id.*

57. *Id.* (quoting *Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000)).

suit for infringement regardless of whether the application is approved or rejected, it was a “needless formality” to have to wait until receiving notice of approval before initiating suit.<sup>58</sup> Thus, because Cosmetic had satisfied the registration requirement by submitting a completed application to the Copyright Office a number of weeks before filing its complaint, § 411(a) did not bar its infringement claim.<sup>59</sup> The case was to proceed on the merits.<sup>60</sup>

## V. ANALYSIS

The Ninth Circuit’s opinion in *Cosmetic Ideas* misinterpreted the plain language of the statute. A proper reading reveals that a copyright holder satisfies § 411(a)’s registration requirement—thus allowing her to bring an infringement claim—at the time that her application for registration is acted on by the Copyright Office, not merely when it is received. In coming to the opposite conclusion, the Ninth Circuit created a “topsy-turvy”<sup>61</sup> statutory scheme. Moreover, because the statute’s plain language is not ambiguous, the court erred by considering its purpose and broader context. Only the registration approach properly harmonizes all statutory language referring to registration, thereby creating a “coherent and consistent” statutory scheme.<sup>62</sup>

### A. *The Plain Language of the Act*

Any exercise in statutory construction begins by analyzing the plain language of the statute.<sup>63</sup> Section 411(a) provides, “[N]o action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.”<sup>64</sup> Admittedly, this provision

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58. *Id.*

59. *Id.* at 620–22.

60. *Id.* at 622.

61. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1204 (10th Cir. 2005), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

62. *Id.* at 1200 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)) (“If the statutory language is not ambiguous, and the ‘statutory scheme is coherent and consistent,’ our inquiry ends.”).

63. *Cosmetic Ideas*, 606 F.3d at 616 (citing *K&N Eng’g, Inc. v. Bulat*, 510 F.3d 1079, 1081 (9th Cir. 2007)).

64. 17 U.S.C. § 411(a) (2006).

alone provides little guidance on what constitutes “registration” or at what point a copyright is “registered.”<sup>65</sup> However,

[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.<sup>66</sup>

Such is the case with the registration requirement. When read in conjunction with other statutory provisions addressing copyright registration,<sup>67</sup> it becomes clear that registration is made under § 411(a) when the Copyright Office approves the application. Furthermore, only this interpretation “produces a substantive effect that is compatible with the rest of the law”<sup>68</sup>—that is, only the registration approach creates a coherent statutory scheme where each provision is operative and terms are given consistent meanings throughout.

The court in *Cosmetic Ideas*, however, did not properly consider the statutory scheme as a whole. First, in concluding “that the plain language of the Act [does not] unequivocally support[] either the registration or application approach,”<sup>69</sup> the court misinterpreted statutory language clearly indicating that it is the Copyright Office, not the copyright holder, that registers a copyright. Second, by adopting the application approach, it interpreted the Act in a way that failed to give effect to every statutory provision and created an inconsistent statutory scheme.

*1. It is the Register of Copyrights and not the applicant that registers a copyright*

The court erred in concluding that the statute “suggests registration is accomplished by completing the process of submitting an application”<sup>70</sup> because the Act makes it clear that it is the Register

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65. *Cosmetic Ideas*, 606 F.3d at 616–17.

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

67. *See, e.g.*, 17 U.S.C. §§ 408–12.

68. *Timbers of Inwood Forest*, 484 U.S. at 371.

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

70. *Id.*

of Copyrights, not the applicant, that actually registers a copyright.<sup>71</sup> The court focused its analysis on determining *what* it means to “register” a copyrighted work and *when* a copyrighted work is “registered.”<sup>72</sup> It is more pertinent, however, to approach the issue by looking at *who* “registers”<sup>73</sup> or “makes registration”<sup>74</sup> of a copyright. Under this approach, because the statutory scheme confers the power to register a copyright exclusively on the Copyright Office, registration cannot be “made” under § 411(a) by an applicant’s actions alone.

Section 410 provides the primary support for this interpretation of § 411(a):

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, *the Register shall register the claim* and issue to the applicant a certificate of registration under the seal of the Copyright Office.<sup>75</sup>

The court conceded that § 410 “suggest[s] that registration is not accomplished by application alone”;<sup>76</sup> however, this concession is insufficient. This statute does more than merely *suggest* that an application is insufficient for registration; it clearly and unequivocally places the sole power of registering copyrights on the Copyright Office. Because the Register is the one to register the copyright after examination, it follows that a copyright is not automatically registered upon an applicant’s unilateral action of submitting an application.<sup>77</sup>

The court argued, however, that “[o]ther sections of the Act . . . cast doubt on this interpretation,” and thus the Act as a whole is

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71. *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3 (D.D.C. 2002) (quoting *Ryan v. Carl Corp.*, No. C 97-3873, 1998 WL 320817, at \*2–3 (N.D. Cal. June 15, 1998)).

72. *Cosmetic Ideas*, 606 F.3d at 617.

73. 17 U.S.C. § 410(a) (2006).

74. *Id.* § 411(a) (permitting an infringement action to be instituted when “registration . . . has been made”).

75. *Id.* § 410(a) (emphasis added).

76. *Cosmetic Ideas*, 606 F.3d at 617.

77. Section 410(d) contains similar language: “The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights . . . to be acceptable for registration, have all been received in the Copyright Office.” 17 U.S.C. § 410(d).

ambiguous.<sup>78</sup> Perhaps its strongest argument as to the ambiguity of the plain language was § 408(a).<sup>79</sup> Section 408(a) provides, “[T]he owner of copyright . . . *may obtain registration* of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee . . . .”<sup>80</sup> The Ninth Circuit argued that this provision “favors the application approach”<sup>81</sup> because it “implies that the sole requirement for obtaining registration is delivery of the appropriate documents and fee.”<sup>82</sup> This is not the case, however. Upon closer analysis, both the language of this section and the inferences that can be drawn from the language Congress did not use are consistent with the registration approach and confirm that third party action is required to register a copyright.

First, because § 408(a) contains the language “may obtain” instead of “shall obtain,” “[it] envisions substantive review of the material by the Register of Copyrights.”<sup>83</sup> In statutory construction, the word “may” is generally a permissive term, as opposed to the mandatory term “shall.”<sup>84</sup> For example, one court interpreted the phrase “each consumer who prevails *may obtain* . . . an order enjoining such acts or failure to act” to mean that it was within the discretion of the trial court to grant or deny injunctive relief.<sup>85</sup> Likewise, the phrase “*may obtain registration* . . . by delivering to the Copyright Office”<sup>86</sup> implies that a copyright is not registered automatically upon submission but that registration is dependent on the discretion of the Copyright Office.<sup>87</sup> This conclusion is bolstered

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78. *Cosmetic Ideas*, 606 F.3d at 617.

79. *Id.*

80. 17 U.S.C. § 408(a) (emphasis added).

81. *Cosmetic Ideas*, 606 F.3d at 617.

82. *Id.*

83. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); *Corbis Corp. v. UGO Networks, Inc.*, 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004).

84. *Bennett v. Pan. Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973); *see also* *United States v. Rogers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute . . .”).

85. *David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831, 839 (Tex. App. 1984) (emphasis added).

86. 17 U.S.C. § 408(a) (2006) (emphasis added).

87. *La Resolana Architects*, 416 F.3d at 1201.

by the fact that in other portions of the Act Congress used the word “shall,”<sup>88</sup> thus underscoring the fact that the terms “shall” and “may” have different meanings within this statutory scheme.<sup>89</sup>

Second, Congress’s use of the phrase “obtain registration” instead of “register” in § 408(a) indicates that it did not intend the applicant to be the one to register copyrights. In the Act, the only time that Congress used the word “register” was in reference to the Register of Copyrights in § 410.<sup>90</sup> Generally, where Congress uses specific language in one section but chooses to use different language in another section of the same Act, the meaning of the first language should not be read into the second.<sup>91</sup> Accordingly, because Congress could have replaced the phrase “obtain registration” with the word “register,” “obtain registration” should not be interpreted to mean the applicant can unilaterally register a copyright.

Congress was clear and consistent in stating that it is the Copyright Office, and not the applicant, who “registers” a copyright claim under § 411(a). Because the Act places the power to “register” a copyright exclusively on the Copyright Office, as evidenced by §§ 408(a) and 410(a), registration cannot be “made” under § 411(a) until the Register approves the application. Thus, only the registration approach is consistent with the plain language of the statute.

*2. The court’s interpretation failed to give effect to every provision and created an inconsistent statutory scheme*

In construing the Act to support the application approach, the court in *Cosmetic Ideas* also committed errors by failing to give effect to every provision of the statute and creating an inconsistent statutory scheme. Only the registration approach provides a coherent interpretation of the Act where each provision is operative and terms have consistent meanings throughout.

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88. 17 U.S.C. § 410(a) (“[T]he Register shall register the claim and issue to the applicant a certificate . . . .”); *id.* § 410(b) (“[T]he Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.”).

89. *See* Fed. Land Bank of Springfield v. Hansen, 113 F.2d 82, 84 (2d Cir. 1940).

90. 17 U.S.C. § 410(a) (“[T]he Register shall register the claim . . . .”).

91. *See, e.g.,* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 176–77 (1994); *see also* Ariz. Elec. Power Coop. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987).

In construing a statute, a court must strive to “give[] effect to every clause and word”<sup>92</sup>—that is, a statute should not be interpreted to render any word or phrase inoperative.<sup>93</sup> In adopting the application approach, however, the Ninth Circuit ignored the statute’s clear differentiation between “application” and “registration.” Furthermore, by holding that a copyright is registered automatically upon application, the court rendered certain provisions of the Act inoperative.

These errors are particularly evident in two provisions: §§ 411(a) and 410(d). In addition to the registration requirement, § 411(a) provides:

In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and *registration has been refused*, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.<sup>94</sup>

As a primary matter, “[b]ecause registration in this subsection is juxtaposed with the separate act of delivering the necessary application materials to the Copyright Office,” this language supports the proposition that mere delivery of an application is insufficient to register a copyright.<sup>95</sup> In other words, because the statute makes it clear that application and registration are two separate events, it follows that registration cannot occur upon application.<sup>96</sup>

Furthermore, the application approach causes this provision to lose meaning in light of the rest of § 411(a). Assuming, arguendo, that the first clause of § 411(a) grants an applicant the right to initiate an infringement action upon delivering an application for copyright registration, it would be unnecessary for the subsequent clause to grant the same applicant the right to initiate an action for infringement when his or her application is refused.

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92. *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993) (quoting *Moskal v. United States*, 498 U.S. 103, 109–10 (1990)).

93. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

94. 17 U.S.C. § 411(a) (emphasis added).

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

96. *See Mays & Assocs. Inc. v. Euler*, 370 F. Supp. 2d 362, 368 (D. Md. 2005) (“In fact, the term *application* is used in the same section [as the term *registration*] and is clearly something separate and apart from registration.”).

More importantly, when interpreted according to the application approach, § 411(a) is unclear and ambiguous. As mentioned above, § 411(a) provides that an applicant can bring a claim for infringement after registration is made or, if registration is refused, after serving notice on the Register of Copyrights.<sup>97</sup> If interpreted based on the application approach, however, this section is unclear because it does not adequately address the scenario in which an applicant has already initiated a copyright infringement action but registration is subsequently refused. In this scenario, it is too late for the applicant to serve notice on the Register *before* instituting the action, thus leaving the applicant not knowing what to do with respect to serving notice on the Register.<sup>98</sup> Under the registration approach, though, it is clear that an applicant cannot institute an infringement action until the Copyright Office acts on the application by either accepting or rejecting it, thus eliminating any lack of clarity in the statute.<sup>99</sup>

The court also committed similar errors in construing § 410(d). Section 410(d) provides:

The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.<sup>100</sup>

In addition to making it clear that registration occurs subsequent to application, thus further evidencing that the two acts are distinct,<sup>101</sup> this provision loses meaning under the application approach. If it were true that the Act provided that a copyright is automatically registered when the materials are delivered to the Copyright Office, it would not be necessary for the copyright registration to be “back dated” to the date of application—the date of the registration would *already* be the date of delivery. Thus, the

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97. 17 U.S.C. § 411(a).

98. *See* *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491 EDL, 2002 WL 1906620, at \*3-4 (N.D. Cal. Aug. 19, 2002).

99. *Id.*

100. 17 U.S.C. § 410(d).

101. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010). (“However, because this back-dating does not occur until after the Copyright Office or a court has deemed the registration acceptable, the statute could be read to require action by the Register to effect registration.”).

most logical interpretation of this provision is that it accounts for the fact that registration is effected subsequent to delivery of the application.

The net result of these errors is that the court in *Cosmetic Ideas* created a statutory scheme with inconsistent interpretations of the terms “registration” and “register.” In statutory construction, a term that appears throughout a statute ought to be given the same interpretation each time it appears.<sup>102</sup> As discussed above, the *only* way to interpret “registration” in §§ 408(a) and 410(a) is to conclude that the Copyright Office “registers” a copyright after examining and approving the application. By concluding that a copyright is automatically registered in § 411(a) after mere application, the court interpreted “registration” differently than dictated by §§ 408 and 410, thus creating an inconsistent statutory scheme. Adopting the registration approach, however, aligns the concept of “registration” throughout the entire Act. Thus, when read as a whole, the plain language of the statute can support only the registration approach.

## VI. CONCLUSION

Unlike registering cars or electronic products, registering copyrights does not occur instantaneously. Accordingly, because the Copyright Act requires a copyright to be registered before the owner can bring suit for infringement, the question has arisen as to whether a copyright is registered for purposes of this registration requirement when it is acted upon by the Copyright Office or when it is merely received. In *Cosmetic Ideas*, the Ninth Circuit resolved this question by looking beyond the plain language of the Act to determine that the application approach best fulfilled Congress’s intent and the overall purpose of the Act. The court, however, erred in this conclusion. First, the court misinterpreted statutory language clearly indicating that it is the Copyright Office, not the copyright holder, that registers a copyright. Second, by adopting the application approach, it interpreted the Act in a way that failed to give effect to every statutory provision and created an inconsistent statutory scheme. Because the plain language of the statute was clear that the Copyright Office must act on an application before it is registered, it

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102. Ratzlaf v. United States, 510 U.S. 135, 143 (1994).

was beyond the court's purview to consider which method best effectuated Congress's policy in enacting the statute.

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