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WLF Asks High Court to Vindicate Copyright Act's Pre-Suit Registration Requirement

(Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC)

“Contrary to the petitioner’s narrow focus on litigating convenience, the Copyright Act advances broad policy concerns that go well beyond the mere convenience of plaintiffs bringing infringement suits.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC— Washington Legal Foundation filed an *amicus curiae* brief with the U.S. Supreme Court today, urging the Court to affirm a decision of the U.S. Court of Appeals for the Eleventh Circuit. That decision confirms that § 411(a) of the Copyright Act allows a plaintiff to sue for infringement only after the Register of Copyrights approves or denies an application to register the copyright.

The case arises from an infringement action by the plaintiff, Fourth Estate Public Benefit Corporation, which creates online news content and licenses it to third-party websites. The defendants, Wall-Street.com and its owner, Jerrold Burden, published some of the plaintiff’s news articles under a licensing agreement. But after the defendants cancelled that agreement, they allegedly continued displaying the plaintiff’s copyrighted content without permission. So the plaintiff sued for infringement.

While the plaintiff’s copyright application was still pending with the U.S. Copyright Office, the defendants moved to dismiss the complaint. Under § 411(a) of the Copyright Act, before a copyright owner can file an infringement action, he must plead that the Register of Copyrights has acted on the application—either by approving or denying it. Because Fourth Estate could not satisfy the Copyright Act’s pre-suit registration requirement, the district court dismissed the suit. Relying on the text, structure, and history of the Copyright Act, the Eleventh Circuit affirmed.

The Supreme Court has agreed to resolve a circuit split over whether copyright “registration” means, as the plaintiff claims, merely *applying* for registration. The Fifth and Ninth Circuits have adopted that view. The Eleventh Circuit joined the Tenth Circuit, however, in holding that registration under § 411(a) occurs only when the Copyright Office *acts* on the application—either by issuing a certificate or by refusing one.

WLF’s brief argues that the plaintiff’s reading of § 411(a) severely disrupts Congress’s broad public goals behind the Copyright Act. By conditioning the right to sue for copyright infringement on the Copyright Register’s review, Congress sought to maintain a public registry of copyright ownership, to conserve judicial resources, and to enlarge the Library of Congress’s collection of copyrighted works. Contrary to the plaintiff’s view, each of those ends is best advanced by the Eleventh Circuit’s registration approach.

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