

INSIGHT: Tips for Protecting Creative Works Following SCOTUS Copyright Ruling

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The U.S. Supreme Court recently ruled that the Copyright Office must act on a copyright application, either to grant or to refuse registration, before a copyright owner can sue for infringement. Eckert Seamans Cherin & Mellott LLC attorneys give four tips on how to protect creative work and get copyright portfolios in shape.

The U.S. Supreme Court on March 4 resolved a long-standing and well-established variation in how different federal circuit courts and the district federal courts for each state in those circuits interpret and apply a portion of copyright rules.

Previously, some circuits had said that copyright owners had to have a copyright registration certificate in hand before they could file a lawsuit for copyright infringement. Other circuits required only that a completed application had to be filed with the Copyright Office prior to filing suit.

In the decision, *Fourth Estate Public Benefit Corp. v. Wall-Street.com LLC*, the Supreme Court ruled that it's not enough to have simply *filed* a completed application. Rather, the Copyright Office must *act* on the application, either to grant or to refuse registration, before a copyright owner can begin a lawsuit to combat infringement. While copyright law still protects your creative works from the moment of creation, the rules regarding enforcement of your copyright rights are now consistent in every federal district court and circuit in the U.S.

A little over four months since the decision, the ramifications are still difficult to assess. The Copyright Office processing times have not been updated since March 31, so it is hard to evaluate whether there has been an increase in registration application filings and therefore processing times, as many commentators had anticipated. In the courts, approximately two dozen decisions have cited *Fourth Estate*, and many have retroactively applied the requirement for a registration certificate.

So, practically, what can artists, writers, musicians, designers—and businesses—do now to protect their creative work? How can copyright owners get their copyright portfolios in shape from an enforcement perspective?

Be Prepared to Act Quickly

There is still no data on whether the Copyright Office is experiencing a greatly increased number of copyright applications or what change, if any, has occurred in application processing times. To take control of what you can in the process, be prepared to use the online application process, if possible, to speed the review of the application, but note some works cannot be submitted online. Also, be prepared to seek expedited processing, which you should pursue when infringement has already happened and the clock is ticking on your statute of limitations period.

File Preemptively

It's better to file applications for registration of new works within three months after the first publication, especially in light of the uncertainty in processing times. If it has been more than three months since the first publication, consider filing an application for registration now, before you may need it to defend your rights against an unauthorized use.

On the U.S. Copyright Office website, you can find useful fact sheets and circulars about copyrights. Consider consulting an intellectual property attorney, who can advise you on how best to protect your creative work.

Budget More for Copyright Protection

Utilizing preemptive filing for copyright registration may increase costs, especially for small businesses or independent artists who may not have routinely budgeted for protecting their works. Expedited processing fees, which may be needed if processing times do increase and/or if there is a concern about the timeliness of commencing a litigation, are higher than routine processing fees, so additional costs may also be incurred if expedited processing is needed.

Have Your Paperwork in Order

Keep your copyright portfolio well organized and up to date. Include the date on which you first published your works and where they were published. Keep extra copies of any physical works (such as books) and high-quality photographs of any three-dimensional works so that you have supporting evidence to submit with your application. And make sure you can find specific items quickly when and if you need them.

While the effect of the Supreme Court's recent decision on the processing time for the copyright registration process is still uncertain, there *is* certainty on the need for a registration certificate in order to defend and enforce your rights in litigation. Acting quickly, being proactive in filing and maintaining records, taking advantage of options to speed along the process, and planning ahead for additional budget expenditures can help you be in the strongest position to preserve, protect, and defend your rights in your creative work. Your creative work is worth it.

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