



Protecting Creative Works After *Fourth Estate v. Wall-Street.com*



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As the one-year anniversary of the Supreme Court's March 2019 decision in *Fourth Estate v. Wall-Street.com* approaches, what have we learned?

In a landmark ruling, the Supreme Court finally unequivocally answered the question about whether copyright owners need to receive a Registration Certificate from the Copyright Office before filing suit for infringement and thus resolved a difference of opinion among various regional circuit courts. (*Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*). Since this decision was issued, federal district courts have cited it in at least 63 decisions.



What should artists, writers, and businesses do now to protect their creative work? How should attorneys alter the standard advice they give their clients? Let's start with a review of what the ruling actually says.

Copyright Owners Must Now Have the Registration Certificate in Hand for Full Protection

On March 4, 2019, the U.S. Supreme Court ruled that it's not sufficient to have simply filed a completed application, but that the Copyright Office must act on the application, either to grant or to refuse registration, before a copyright owner can commence a lawsuit to combat infringement. The ruling resolved a long-standing circuit split on this issue.

In its brief to the Supreme Court in this case, the petitioner argued that requiring the issuance and receipt of a registration certificate before filing suit would dramatically constrict a copyright owner's ability to stop infringements and enforce its rights in court, given the statutory time limit (three years) in which to file suit. But the Court dismissed this concern as "overstated," noting that "the average processing time for registration applications is currently seven months."

Processing Times for Obtaining a Registration Certificate

The Copyright Office has not updated its statistics about processing times since September 30, 2019, but even then, the Office reported that, on average, it takes 3-6 months for the Office to process claims (received online and by mail) that do not require correspondence and 6-9 months to process claims (online and mail) that do require correspondence. See [Registration Processing Times](#) for more information.

These statistics show **an average decrease of one month in most categories of filings** when compared to the statistics posted on March 31, 2019 – shortly after the decision was handed down. As this website [previously reported](#), Karyn Temple, the Register of Copyrights and Director of the Copyright Office, recently testified that decreasing processing times has been a goal in the Copyright Office's modernization efforts.

Nevertheless, even as of September, processing these applications may still extend into many months, with the longest listed time being 22 months. See [Registration Processing Times](#) for more information.

The Three-Year Statute of Limitations on Filing Copyright Infringement Actions

Because the statute of limitations to file copyright infringement actions is three years, and the Certificate of Registration must be in hand before filing, copyright owners should be especially diligent in seeking registration as soon as possible. Swift action helps to ensure that the owner should not be barred from bringing an infringement action either because no Certificate of Registration is in hand or because of the statute of limitations.

It is also important to keep in mind that while *Fourth Estate* resolved a circuit split on the issue of what “registered” means, the circuits still vary on the issue of when a copyright infringement claim accrues. Thus, copyright owners must pay attention to which copyright infringement claim rule applies in their particular jurisdiction. Either the Discovery Rule or the Incident of Injury Rule will apply. For most circuits, the three-year statute of limitations begins to run when the copyright owner “knows or has reason to know” that the infringement has occurred – the “Discovery Rule.” But other circuits hold that a copyright owner’s claims must be filed within three years after the infringing event occurred – the “Incident of Injury Rule.”

Continued Impact of the New Rule on the Copyright Process

Budgets for protecting copyrights may still need to be increased because of the need to file preemptively for registration of any work that could conceivably be infringed. This increased cost may be particularly notable to small businesses or independent artists who may not have a substantial resources to spend on protecting their valuable works.

Budgetary consideration should also be given to the higher filing fees for special handling, in the instance when a request for rush processing may be needed because of an imminent statute of limitation deadline. The Special Handling Fee per claim is currently \$800.00 (US) per claim.

In addition, it is uncertain whether or not the Copyright Office has seen a jump in applications that seek expedited treatment (special handling) because litigation is anticipated. (*Special Handling, Circular No. 10* and *Copyright Compendium: Overview of the Registration Process*) The Copyright Office predicted that it may not be able to provide a determination of registration within the five working days suggested by the Compendium. Statistics for special handling are not specifically delineated on the *Registration Processing Times* page of the Copyright Office.

The Best Course of Action to Protect Creative Work Continues to Be “File Now”

Our basic recommendations remain the same as immediately after the decision was rendered – that copyright owners should apply for copyright registration of all creative works early and proactively. Don't wait until infringement occurs. Instead, apply for registration of creative works with the Copyright Office on a more frequent, routine basis. At the very least, get in the habit of filing applications for registration of new works within three months after the first publication, or even before publication, if warranted. Not only is the receipt of the Registration Certificate from the Copyright Office now required before a complaint can be filed in federal court, but copyright owners also can place themselves in better positions to seek statutory damages (particularly useful if the loss resulting from an infringement is hard to quantify) and the recovery of their attorney's fees if they prevail in the case.

Using the online application process, if possible, may also speed the review process, result in shorter processing times, and is the process recommended by the Copyright Office itself. If you need to obtain a Registration Certificate on a rush basis, consider seeking expedited processing (*Special Handling*, Circular No. 10), in appropriate cases.

Nearly one year after *Fourth Estate*, even with the apparent decrease in processing times at the Copyright Office, it is just plain prudent to file for registration of one's valuable works routinely and proactively. Doing so ensures that creative works are protected and may preserve the owner's right to seek statutory damages and attorney's fees in appropriate cases. This strategy gives copyright owners a better chance to combat misuse and offset lost revenue.

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