

THE ESTATE OF COPYRIGHT:  
THE RIPPLING EFFECTS OF  
*FOURTH ESTATE V. WALL-STREET.COM* ON  
COPYRIGHT REGISTRATION APPLICANTS

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## INTRODUCTION

The Constitution explicitly protects the promotion of useful arts and science.<sup>1</sup> To encourage this promotion, Congress entitles creators exclusive copyright ownership upon their work’s creation.<sup>2</sup> Under the Copyright Act of 1976, creators may take civil action to protect their works from copyright infringement.<sup>3</sup> Although an original work is protected from the moment it is fixed into a tangible medium, a creator cannot file a copyright infringement suit until “registration of the copyright claim has been made.”<sup>4</sup> But what does “registration . . . has been made”<sup>5</sup> actually mean? In early 2019, in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*,<sup>6</sup> the Supreme Court of the United States resolved a decades-long circuit split on the correct interpretation of “registration” as stated in the Copyright Act.<sup>7</sup> Prior to this recent decision, circuit courts were divided between approaches allowing copyright infringement suits after application submission (application approach) or after completed registration (registration approach).<sup>8</sup> The Fifth and Ninth Circuits followed the “application approach” and held that simply filing a copyright application sufficiently met the registration requirement under § 411(a).<sup>9</sup> The Tenth and Eleventh Circuits, however, followed the “registration approach” and held that the Copyright Office (Office) must take action—either issue or deny copyright registration—to sufficiently meet

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1. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing . . . the exclusive Right to . . . Writings and Discoveries.”).

2. See 17 U.S.C. § 101 (2018) (stating a work is created the moment “it is fixed in a copy . . . for the first time”); see also 17 U.S.C. § 102(a) (attaching copyright protection to any original work that is “fixed in [a] tangible medium”); 17 U.S.C. § 106 (giving creators exclusive rights to reproduce, create derivatives, distribute, perform, and display their work).

3. See Pub. L. No. 94-553, § 501, 90 Stat. 2541, 2584 (1976) (“The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of §§ 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

4. *Id.* § 411(a), 90 Stat. at 2583.

5. *Id.*

6. 139 S. Ct. 881 (2019).

7. See *id.* at 888–89 (holding that registration occurs upon copyright issuance or denial).

8. *Id.* at 887.

9. Hayley N. Sipes, *Registration Approach vs. Application Approach: Section 411(a)’s Copyright Registration Requirement*, 58 WASHBURN L.J. ONLINE 11, 12 (2018), <http://washburnlaw.edu/wjonline/sipes-copyright>.

the registration requirement.<sup>10</sup> This distinction is critical because registration can happen in a matter of minutes,<sup>11</sup> while processing an application takes significantly longer, with most applications being subject to an average waiting period of five months.<sup>12</sup> Furthermore, processing times vary depending on whether an application is an online or a mail claim, and whether the application requires correspondence.<sup>13</sup> Thus, the application approach was more desirable for creators. In *Fourth Estate*, the Supreme Court used textual analysis to conclude that when reading the three adjoining sentences of the legislation together, “registration” requires Office action, affirming the registration approach.<sup>14</sup> The Court held that although registration is voluntary, it is required prior to taking legal action and, thus, “is akin to an administrative exhaustion requirement . . . .”<sup>15</sup>

What lies ahead for artists in the aftermath of *Fourth Estate*? When it comes to copyright law, copyright infringement suits usually involve only the larger names in the industry.<sup>16</sup> But what about the little guys? A recent

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10. *Id.* at 11, 13.

11. See generally U.S. COPYRIGHT OFFICE, CIRCULAR 2: COPYRIGHT REGISTRATION (2019) [hereinafter CIRCULAR 2], <https://www.copyright.gov/circs/circ02.pdf> (applying online for registration can happen within minutes if all required elements are ready for submission).

12. See Letter from Karyn A. Temple, Register of Copyrights and Director, U.S. Copyright Office, to Jerrold Nadler, Chairman, and Doug Collins, Ranking Member, House Judiciary Committee, U.S. House of Representatives, attach. 2 at 8 (May 31, 2019), [hereinafter Letter Response Cong. Inquiries], [https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Response%20to%20April%202019%20House%20of%20Representatives%20Letter\\_0.pdf](https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Response%20to%20April%202019%20House%20of%20Representatives%20Letter_0.pdf) (listing the average processing time for all claims as of March 2019).

13. See U.S. COPYRIGHT OFFICE, REGISTRATION PROCESSING TIMES & FAQ (2019) [hereinafter PROCESSING TIMES & FAQ], <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> (noting that mail claims with no correspondence average seven months, whereas electronic claims with no correspondence average four months). Some claims require correspondence—communication between the Copyright Office (Office) and claimant to clarify application deficiencies—which increase the average processing time to an average of seven months for electronic claims and fourteen months for mail claims. *Id.*

14. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019) (holding that the second sentence, which allows creators to file suit after registration denial, would be irrelevant if a creator need only submit an application). Additionally, the third sentence, which allows the Register of Copyrights (Register) to become a party to the action, further persuaded the Court that the registration approach is the correct interpretation because, if a suit could be resolved before an application is processed, this measure would also be useless. *Id.*

15. *Id.* at 887.

16. See Jordan Runtagh, *Songs on Trial: 12 Landmark Music Copyright Cases*, ROLLING STONE (June 8, 2016), <https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/> (showing that landmark music copyright infringement cases usually involve big stars such as Ed Sheeran, Madonna, Justin Bieber, and Led Zeppelin).

infringement case between the worldwide pop sensation Katy Perry and the relatively obscure Christian gospel rapper Flame highlights the importance of equal access to the court system for all artists, big or small, who face potential infringement.<sup>17</sup> This case went to trial in July 2019, where a jury decided that Katy Perry's top hit, "Dark Horse," substantially copied Flame's song "Joyful Noise."<sup>18</sup> Just recently, in March 2020, the same court reversed the jury's decision as a Judgment as a Matter of Law.<sup>19</sup> Most likely, Flame will appeal this decision and further litigation will continue.<sup>20</sup> Notwithstanding the most recent decision, Flame's ability to access the court system in a timely manner was crucial.

Flame published "Joyful Noise" in March 2008, and several years later, Katy Perry released "Dark Horse" in September 2013.<sup>21</sup> Flame became aware of Perry's song in January 2014, filed for copyright registration five months later, and subsequently filed suit for copyright infringement the following month, in July 2014.<sup>22</sup> Like many smaller artists, Flame postponed filing for registration until he was faced with a potential copyright infringement claim. Luckily for Flame, he was able to file suit for copyright infringement while his registration application was pending with the Office because he filed his case pre-*Fourth Estate* in the Ninth Circuit, following the application approach.<sup>23</sup> But imagine how this case would have played out in a post-*Fourth Estate* reality. Flame would not have been able to file a claim until October 2014, when the

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17. See *Gray v. Perry*, No. 2:15-cv-05642-CAS(JCx), 2018 U.S. Dist. LEXIS 138263 (C.D. Cal. Aug. 13, 2018).

18. *Id.*

19. *Gray v. Perry*, No. 2:15-cv-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at \*13, \*52 (C.D. Cal. Mar. 16, 2020).

20. See Ben Sisario, *Katy Perry Prevails as Judge Erases 'Dark Horse' Decision*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/arts/music/katy-perry-dark-horse.html> (predicting that litigation may continue as the judge's decision notes that a new trial will be granted should an appeals court disagree with the ruling).

21. David Daniels, *Flame's DJ Explains Why 'Joyful Noise' And Katy Perry's 'Dark Horse' Are Similar*, RAPZILLA (July 2, 2014), <https://rapzilla.com/2014-07-flames-explains-joyful-noise-katy-perry-dark-horse/>.

22. *Gray*, 2018 U.S. Dist. LEXIS 138263 at \*1, \*3; see also Daniels, *supra* note 21 (recounting the timeline of events).

23. See *Gray v. Hudson*, No. 14CV1183 HEA, 2015 U.S. Dist. LEXIS 95969, at \*27, \*28 (E.D. Mo. July 23, 2015) (lacking personal jurisdiction and thus transferring the case to the United States District Court for the Central District of California); see also Complaint at ¶ 21, *Gray v. Perry*, No. 15-cv-05642-CAS-JCx (E.D. Mo. July 1, 2014), ECF No. 1 (stating that Flame's application was pending at the time the complaint was filed).

Office finally issued a Certificate of Registration.<sup>24</sup> Delaying Flame's access to the courts until he acquired copyright registration would leave Flame helpless as potential irreparable economic and reputational harm accrued. This copyright infringement dispute between Flame and Katy Perry, operating under the post-*Fourth Estate* rule, will serve as an example throughout the Comment to illustrate the real-world impact this decision has on smaller artists.

This Comment discusses the copyright infringement concerns artists like Flame now face post-*Fourth Estate*. Part I details the general copyright registration process, including the different requirements and processing times for online and mail applications, as well as the different options for applicants depending on the type of work being registered. Part II examines the main concern smaller creators face in the aftermath of *Fourth Estate* and lists the current expediting options available to those with time sensitive claims. Part III first describes the Office's hybrid characteristics and its administrative authority under the Copyright Act of 1976 and then highlights the Office's past, present, and future administrative actions. Part IV asserts that the appropriate entity to remedy this concern is the Office and specifically suggests that the Register of Copyrights (Register) should propose new rulemaking to address the rippling effect the *Fourth Estate's* holding will have on smaller artists like Flame.

## I. THE REGISTRATION PROCESS

The filing process for copyright registration is usually rather quick and easy. A registration application is normally comprised of three fundamental elements: "a completed application form, a nonrefundable filing fee, and a nonreturnable deposit" of the creator's work.<sup>25</sup> The application form establishes the information that the Office needs to create a record of the work, including its title, author, copyright owner's name and address, year the work was created, and whether the work is published or has previously been copyrighted.<sup>26</sup> The mandatory nonrefundable filing fee varies in amount depending on the type of registration application, and must be processed before the Office can take action on an application.<sup>27</sup> The nonreturnable

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24. Exhibit 2 for Plaintiff's Amended Complaint, *Gray*, No. 15-cv-05642-CAS-JCx (Oct. 6, 2014), ECF No. 28-2 (filing Flame's Certificate of Registration with the court).

25. See CIRCULAR 2, *supra* note 11, at 1 (stating that the Office will not review an application until all three elements are completed and in compliance with the regulations and policies).

26. See *id.* (providing a clear and accurate record promotes public interest, ensures accurate information for licensees, and decreases cost of copyright litigation).

27. *Id.* at 3; U.S. COPYRIGHT OFFICE, CIRCULAR 4: COPYRIGHT OFFICE FEES 1, 5 (2020) [hereinafter CIRCULAR 4], <https://www.copyright.gov/circs/circ04.pdf> (allowing filing fees to be paid via credit card, debit card, check, or money order).

deposit is a copy of one or more replications of the submitted work that the creator provides the Office to become a part of the public record.<sup>28</sup>

#### A. *Online versus Paper Applications*

Instead of filing paper applications, the Office strongly recommends that applicants apply online through the electronic Copyright Office (eCO) for basic registration of musical works, sound recordings, visual arts works, performing arts works, literary works, motion pictures, single serial issues, and group registrations of serials.<sup>29</sup> The benefits of applying online include a lower filing fee, shorter processing time, online status tracker, varying payment options, and the ability to directly upload an electronic deposit to eCO.<sup>30</sup> There are two online registration applications, a single application with a \$45 filing fee and a regular application with a \$65 filing fee.<sup>31</sup> The average processing time for an online application with no correspondence is four months, but can take as long as seven months; whereas the average processing time for online claims requiring correspondence is seven months, but can take as long as fifteen months.<sup>32</sup> Thus, it is critical that applicants take the time to ensure that they have selected the correct type of registration form and have provided as much accurate and detailed information as possible to minimize the chance of requiring correspondence. Although the online registration option is preferred, applicants can still choose to submit

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28. See CIRCULAR 2, *supra* note 11, at 1, 3 (using the deposit for examination and public record).

29. See CIRCULAR 4, *supra* note 27, at 2 (requiring electronic submission of certain works: “[c]ontributions to periodicals, . . . published . . . [and] unpublished photographs, newspapers,” and supplementary registration applications); U.S. COPYRIGHT OFFICE, REGISTERING A COPYRIGHT WITH THE U.S. COPYRIGHT OFFICE (2016) [hereinafter REGISTERING COPYRIGHT], <https://www.copyright.gov/fls/sl35.pdf>.

30. See CIRCULAR 2, *supra* note 11, at 2 (submitting online speeds up the processing of claims and moves toward modernizing copyright registration).

31. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1405–1405.7 (3d ed. Public Drft. Rev. 2019) [hereinafter COMPENDIUM], <https://www.copyright.gov/comp3/docs/3-15-19/compendium-draft.pdf> (providing a lower fee for the simplest claims to encourage registration); U.S. COPYRIGHT OFFICE, SCHEDULE OF FEES (2020) [hereinafter 2020 FEE SCHEDULE], <https://www.copyright.gov/about/2020-fees.pdf> (listing the new fees for each service effective March 20, 2020); CIRCULAR 4, *supra* note 27, at 2, 7 (allowing simpler submissions of one work by a single author, who is also the claimant, and not the result of work for hire, to be filed as a single application); REGISTERING COPYRIGHT, *supra* note 29, at 1.

32. PROCESSING TIMES & FAQ, *supra* note 13 (informing applicants that processing times vary based on how difficult a claim is to review, whether the deposit was submitted electronically or in physical form, and the number of examiners available).

their works through the paper application.<sup>33</sup> The application fee for basic paper submissions is \$125.<sup>34</sup> As expected, the processing times for mail submissions are longer than electronic submissions.<sup>35</sup>

Flame's song "Joyful Noise" is a sound recording and musical work. Thus, in our post-*Fourth Estate* version of Flame's dispute, the Office would recommend that he register his song online. Because Flame co-wrote "Joyful Noise" with Lecrae and two other songwriters,<sup>36</sup> Flame would not be able to register it as a single application and would have to use the standard application.<sup>37</sup> Flame would need to go online to eCO, complete the standard application form, submit a filing fee of \$65 for this one song, and upload a deposit of the audio recording and sheet music.<sup>38</sup>

### B. Group Works

The Office generally requires applicants to submit an individual application for each work with its own form, filing fee, and deposit.<sup>39</sup> However, there are three exceptions that allow applicants to group works together to cut down on unnecessary time delays and financial expenses that may deter creators from registering their works: collective works, group works, and units of publication.<sup>40</sup>

Collective works, such as an album with multiple songs, are compilations of independent works assembled together as one. To qualify for registration

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33. REGISTERING COPYRIGHT, *supra* note 29; *see also* CIRCULAR 2, *supra* note 11, at 2 (requiring certain works to be submitted via a paper application).

34. CIRCULAR 4, *supra* note 27, at 2, 7; 2020 FEE SCHEDULE, *supra* note 31, at 1; *see also* REGISTERING COPYRIGHT, *supra* note 29 (requiring a higher filing fee based on the higher labor costs for an examiner to review and process a paper application compared to an online application).

35. *See* PROCESSING TIMES & FAQ, *supra* note 13 (noting that mail claims with no correspondence average seven months and electronic claims with no correspondence average four months).

36. Exhibit 2 for Plaintiff's Amended Complaint, *supra* note 24, at 2 (listing four copyright claimants for Joyful Noise); Andrew Dalton, *A Jury Found that Katy Perry's Hit 'Dark Horse' was Copied from a Christian Rap Song—Compare Both Videos Here*, INSIDER (July 29, 2019), <https://www.insider.com/katy-perry-dark-horse-copied-from-2009-christian-rap-jury-2019-7>.

37. *See* CIRCULAR 4, *supra* note 27, at 7 (highlighting that single applications are only available when works are written by a single author).

38. CIRCULAR 2, *supra* note 11, at 2; *see also* COMPENDIUM, *supra* note 31, § 511 (stating that a sound recording and musical work can be registered together if they are embodied in the same copy, have the same claimant, and are submitted via the sound recording application form).

39. U.S. COPYRIGHT OFFICE, CIRCULAR 34: MULTIPLE WORKS (2019) [hereinafter CIRCULAR 34], <https://www.copyright.gov/circs/circ34.pdf>.

40. *Id.* at 1; COMPENDIUM, *supra* note 31, § 1104.1.

as a collective work, the owner of the collective work must also own the individual works, and the works must be unregistered, unpublished, and not in the public domain.<sup>41</sup> Creators of collective works are entitled to a single award of statutory damages for the work as a whole, regardless of how many works within the compilation are infringed upon.<sup>42</sup>

Unlike collective works, group registration is merely an administrative formality and permits one application and one fee for each group of works for registration efficiency.<sup>43</sup> To be eligible for group registration of unpublished works,<sup>44</sup> all of the works must be of the same type and registration class on the application, titled, unpublished, created by the same author or authors who are also the copyright applicants, and submitted online with uploaded digital copies.<sup>45</sup> Distinguished from collective works, group registration allows creators to collect individual statutory damages for different works within a group registration.<sup>46</sup>

A unit of publication allows for applicants to register multiple published works under one application and one fee provided that the works were previously “physically packaged or bundled together” and were first published as that packaged unit.<sup>47</sup> There are many specific requirements for a unit of publication and, thus, most works do not qualify for this application.<sup>48</sup>

For example, if Flame wanted to register his songs together, he could only register them as a collective work.<sup>49</sup> Flame’s album, *Our World: Redeemed*, which includes “Joyful Noise,” consists of sixteen songs with varying authors and was published the moment Flame released his album in 2008.<sup>50</sup> Therefore, he would not be able to utilize the group registration of unpublished works.<sup>51</sup>

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41. See CIRCULAR 34, *supra* note 39, at 2 (noting that the collective work registration remains in effect even after the creator publishes his or her works).

42. *Id.* at 1–3.

43. See *id.* at 3–4 (limiting group registration of unpublished works to serials, newspapers, newsletters, contributions to periodicals, published photographs, unpublished photographs, database updates and revisions, and items used in a secure test).

44. See *id.* at 5 (applying only to literary, visual arts, performing arts works; sound recordings; and motion picture works, and limited to a maximum of ten unpublished works per application).

45. See *id.* (commenting that group registration also remains in effect after publication).

46. *Id.* at 4.

47. *Id.* at 6.

48. See *id.* at 6–7 (noting the many disqualifications include works that were first published digitally or on different days, or works distributed to retailers and wholesalers).

49. See *id.* at 2 (permitting musical works and sound recordings).

50. Flame, *Our World Redeemed*, BANDCAMP, <https://crossmovement.bandcamp.com/album/our-world-redeemed> (last visited May 10, 2020).

51. *Supra* text accompanying notes 44, 45. Flame’s album exceeds the maximum number



Flame would also be unable to file as a unit of publication because he initially released *Our World: Redeemed* as a digital album.<sup>52</sup> However, Flame would most likely not choose to register his album as a collective work either because he would only be able to collect a single statutory damage award regardless of which or how many songs were infringed upon.<sup>53</sup>

## II. TROUBLE WAITS, JUST AROUND THE RIVERBEND

At the conclusion of the Supreme Court's opinion in *Fourth Estate*, Justice Ginsburg, writing for a unanimous Court, noted real concerns creators face in this arena and asserted that the solution cannot come from the Court.<sup>54</sup> The Court's affirmation of the registration approach means that creators cannot sue for copyright infringement until the Office either issues or denies registration.<sup>55</sup> The purpose of copyright protection is to encourage creators to generate and distribute their works.<sup>56</sup> The purpose of the registration approach is to encourage creators to register their works in a timely manner.<sup>57</sup> The registration approach's implications illustrate that these two goals actually work contrary to each other.<sup>58</sup>

The obvious concern for creators is that someone will infringe upon their work prior to Office action, thus forcing them to wait, sometimes a prohibitively long time, before they can seek a legal remedy. This involves a delay in filing infringement suits and any preliminary injunctive relief, which also delays and potentially hinders creators' ability to recover statutory

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of unpublished works allowed in this group registration. *Id.* Additionally, Flame has already released his album, which published his songs. See U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS 7 (2019) [hereinafter CIRCULAR 1], <https://www.copyright.gov/circs/cir-c01.pdf> (distributing phonorecords to the public, such as releasing an album, constitutes publication).

52. Flame, *supra* note 50.

53. *Supra* text accompanying note 42.

54. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (suggesting that, with the significant increase in registration processing times, the statutory scheme does not reflect Congress's intentions and that Congress must remedy this).

55. See generally *supra* Part I (resulting in not only a delay in the ability to sue but also a delay in any injunctive relief sought in the meantime).

56. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (noting that the copyright system supplies "economic incentive[s] to create and disseminate ideas").

57. Devin Hartline, *How the Supreme Court Made It Harder for Copyright Owners to Protect Their Rights—and Why Congress Should Fix It*, CTR. FOR PROTECTION OF INTELL. PROP. BLOG (Mar. 7, 2019), <https://cpip.gmu.edu/2019/03/07/how-the-supreme-court-made-it-harder-for-copyright-owners-to-protect-their-rights-and-why-congress-should-fix-it/>.

58. See *id.* (arguing that the registration approach "disincentivizes dissemination" because now creators are more hesitant than ever to release their work prior to copyright registration).

damages and attorney's fees.<sup>59</sup> Yet, the biggest impact stems from delaying preliminary injunctive relief.<sup>60</sup> Therefore, the *Fourth Estate* decision directly harms creators because there is little incentive for them to produce and publicize their works when copyright protection is inaccessible, and thus meaningless, until registration is complete.<sup>61</sup> Furthermore, the decision harms society as a whole because progress is halted without creators continuing to generate useful arts and sciences.

#### A. *File Early and Often*

The existing solutions include registering early and often, making use of the preregistration placeholder, or opting for the special handling request.<sup>62</sup> In an ideal world, all creators would be able to afford the solution of registering their works early and often; thus guaranteeing their copyright protection. However, this option is only realistic for those who do not have monetary constraints. If Flame elected to register each individual song immediately after completion, he would pay \$65 per song.<sup>63</sup> So, on Flame's sixteen-song album, registering each song individually would cost him \$1,040 in application fees alone. This does not account for the costs associated with producing an album.<sup>64</sup> For smaller artists like Flame, funding the production of an album can quickly

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59. See KEVIN J. HICKEY, CONG. RESEARCH SERV., LSB10202, WHEN CAN COPYRIGHT HOLDERS SUE?: SUPREME COURT TO RESOLVE CIRCUIT SPLIT ON COPYRIGHT REGISTRATION 2 (2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10202> (stating that “statutory damages and attorney fees are only available . . . after the work is registered”; however, applicants may recover damages incurred before and after registration).

60. See Susan Neuberger Weller & Harold S. Laidlaw, *U.S. Supreme Court Holds That Copyrights Must Be Registered Before Plaintiffs Can File Infringement Suits*, NAT'L L. REV. (Mar. 5, 2019), <https://www.natlawreview.com/article/us-supreme-court-holds-copyrights-must-be-registered-plaintiffs-can-file> (asserting that copyright infringement without access to preliminary injunctions subjects owners to “irreparable harm”); Hartline, *supra* note 57, at 5 (noting that courts frequently grant injunctive relief because the harm from infringement is often irreparable).

61. Hartline, *supra* note 57, at 5.

62. U.S. COPYRIGHT OFFICE, CIRCULAR 10: SPECIAL HANDLING (2020) [hereinafter CIRCULAR 10], <https://www.copyright.gov/circs/circ10.pdf>; *Preregistration FAQ*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-prereg.html> (last visited May 10, 2020); Weller & Laidlaw, *supra* note 60.

63. See CIRCULAR 4, *supra* note 27, at 2 (discussing the price of registering a work online); 2020 FEE SCHEDULE, *supra* note 31, at 1.

64. See Max Monahan, *How Much Does It Really Cost to Make an Album? A Breakdown of the Costs Involved*, SONICBIDS BLOG (June 28, 2016, 8:00AM), <http://blog.sonicbids.com/how-much-does-it-really-cost-to-make-an-album> (summarizing that the average cost of producing an album—which includes gear, rehearsal space, recording, engineering, mixing, and mastering—ranges from \$1,000 to \$100,000).

deplete his or her available funds. This forces the artist to prioritize publication over copyright registration and, thus, postpone or even forego registration altogether.

Alternatively, there are two expediting options—preregistration and special handling—available for applicants who do not want to wait several months for the Office to issue or deny registration.<sup>65</sup> Both of these options expedite the registration process from an average of five months to just five business days, but come at a high cost.<sup>66</sup>

### B. Preregistration

Preregistration is not a substitute for registration but rather a “placeholder” that allows applicants to take infringement action prior to their work’s full registration and commercial distribution.<sup>67</sup> To qualify for this option, it must be an unpublished work that is being prepared for commercial distribution and also must fall within one of the acceptable work types: motion pictures, sound recordings, musical compositions, literary works, computer programs, or advertising or marketing photographs.<sup>68</sup> The preregistration process is only available online and consists of an application, a nonrefundable \$200 filing fee, and a full description of the work.<sup>69</sup> Preregistration copyright protection is preserved as long as the claimant registers his or her work within a month of becoming aware of infringement, or no later than three months after his or her first publication.<sup>70</sup> If the claimant fails to do so, a court must dismiss the infringement action.<sup>71</sup>

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65. See Letter Response Cong. Inquiries, *supra* note 12, attach. 2 at 10–11 (allowing all applicants to apply for special handling but limiting preregistration to certain works).

66. See *id.* at 1, 8, 15–16 (averaging all claims with a processing time of five months).

67. *Preregistration FAQ, supra* note 62, at 1; see also Letter Response Cong. Inquiries, *supra* note 12, attach 2 at 11 (asserting that this simple, fast-tracking option—processing a claim with no deficiencies in five working days—is extremely “underutilized,” with only 661 preregistration applications in the 2018 fiscal year). But see COMPENDIUM, *supra* note 31, § 202.2 (“[T]he vast majority of applicants would not benefit from this service.”).

68. See *Preregistration FAQ, supra* note 62, at 1 (limiting preregistration to these classes of works because they have a history of pre-release infringement in physical and digital format).

69. See *id.* at 1–2 (noting that the application must assert “a reasonable expectation of commercial distribution,” but that a copy of the work is not required); 2020 FEE SCHEDULE, *supra* note 31, at 2 (listing the new fee for preregistration).

70. *Preregistration FAQ, supra* note 62, at 2 (recognizing that people who have heard or have access to a creator’s unpublished work can copy and release a version of the work prior to the creator’s first publication).

71. *Id.*

For artists like Flame, spending an additional \$200 for preregistration to secure a safety net while waiting for full registration is neither an appealing nor a suggested route.<sup>72</sup> If Flame were to preregister every incomplete song he intended to release and ultimately register, he would spend \$265 per song, totaling \$4,240 for all sixteen songs on his album, *Our World: Redeemed*. This is simply not a viable option for artists living below “popstar” status. Furthermore, preregistration is an expediting option limited to select “works that the Register of Copyrights has determined have a history of pre-release infringement.”<sup>73</sup> Accordingly, the Office prepares for and receives a small number of preregistration applications that meet the requirements.<sup>74</sup>

### C. *Special Handling*

Unlike preregistration, special handling is not a placeholder requiring an application. Rather, it is a request applicants can make upon or after submitting their registration application.<sup>75</sup> Special handling allows applicants to move their applications to the front of the examination line for an \$800 fee.<sup>76</sup> The Office grants special handling only to those who have “pending or prospective litigation,” “custom matters,” or deadlines that require an “expedited issuance.”<sup>77</sup> Just like preregistration, the Office attempts to complete special handling requests within five business days, but can be delayed if the application requires correspondence.<sup>78</sup>

Examining the Flame example, special handling is technically available to Flame because he anticipates litigation with Katy Perry pursuant to his claim of copyright infringement. However, for this option to be possible, Flame would need \$800 for the special handling fee, and the Office would have to

72. *See id.* at 1 (highlighting that preregistration is not useful for the vast majority and should be considered only when there is a high risk of infringement of an unfinished, pre-released work); 2020 FEE SCHEDULE, *supra* note 31, at 2 (listing the new filing fee for preregistration at \$200).

73. *Preregistration FAQ*, *supra* note 62, at 1.

74. *See* 2018 U.S. COPYRIGHT OFF. ANN. REP. app. at 22 [hereinafter FY 2018 REPORT], <https://www.copyright.gov/reports/annual/2018/ar2018.pdf> (summarizing a total of just 546 preregistrations). Additionally, if preregistration were suddenly flooded with a significant influx in applications, the current examiners would likely be overwhelmed; thus leading to noticeable delays and reduction in efficiency.

75. *See* CIRCULAR 10, *supra* note 62, at 1.

76. *See id.* at 2–3 (applying to both online and paper applications, but encouraging applicants to submit their request online).

77. *See* COMPENDIUM, *supra* note 31, § 623.2; CIRCULAR 10, *supra* note 62, at 1 (reminding applicants that the Office may refuse to grant their request if the stated reason is not sufficiently justified, or if the Office’s workload or budgetary restraints prohibit it from processing the request).

78. Letter Response Cong. Inquiries, *supra* note 12, attach. 2 at 11.

accept and be able to fulfill his request.<sup>79</sup> While the Supreme Court suggests that a \$800 fee is inconsequential compared to attorney fees and federal court costs, the comparison is immaterial when debating whether a person can afford the initial step to access his or her statutory rights.<sup>80</sup> Akin to school sports programs, whose joining fees shift the financial burden onto students and their families, the Office is inadvertently implementing a “pay-to-play” system by requiring a steep filing fee; it thus leaves smaller artists without a feasible remedy.<sup>81</sup> While the Office rightfully places the financial burden of expediting claims on the requesting applicants, equally shifting this burden to all applicants, regardless of financial status, prevents those who are less financially stable from accessing an option that is only theoretically available to them.

#### D. *What Are Flame’s Options?*

Attorneys in the music industry recommend that artists consider several factors prior to registering, such as whether they want to register an unfinished work, if the work is being disseminated as a single or a part of an album or Extended Play (EP, or if the purpose of the song is for a placement.<sup>82</sup> Flame already released his album in 2008. Years later, Flame became aware of “Dark Horse” after leaving a concert with Lecrae, when they “noticed an ‘influx’ of tweets” asking about the similarities between “Joyful Noise” and “Dark Horse.”<sup>83</sup> Flame did not file for copyright registration for “Joyful Noise” until he became aware of potential copyright infringement in 2014.<sup>84</sup> Because Flame waited to file for registration until faced with possible infringement, in a post-*Fourth Estate* reality, he would have been without recourse until October 2014 while “Dark Horse” sat atop the Billboard Hot 100 for four weeks

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79. *Supra* text accompanying note 76.

80. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 n.6 (2019); HICKEY, *supra* note 59, at 2.

81. See Dianne L. Hoff & Sidney N. Mitchell, *Pay-to-Play: Fair or Foul?*, 88 PHI DELTA KAPPAN 230, 230–31 (2006) (stressing that there are better ways for entities to provide participants with affordable programs).

82. See Erin M. Jacobson, *Ask a Music Lawyer: When Is the Right Time to Register Your Songs With the Copyright Office?*, SONICBIDS BLOG (Sept. 1, 2016, 6:00AM), <http://blog.sonicbids.com/when-should-you-register-your-songs-with-the-copyright-office> (advising artists to wait until their songs are complete and released before registering them, but to register songs prior to submitting materials to labels, and to opt for group registration for albums and Extended Plays (EPs) all to cut down on unnecessary registration costs).

83. Daniels, *supra* note 21.

84. Exhibit 2 for Plaintiff’s Amended Complaint, *supra* note 24, at 1 (listing the effective date of registration as June 3, 2014, representing the date Flame filed for registration, which was after he became aware of “Dark Horse”).

earning millions of dollars.<sup>85</sup> Post-*Fourth Estate*, Flame's economically feasible options would have been to either submit an individual regular application for "Joyful Noise," or a collective work of the whole album. Regardless of his choice in type of registration, Flame's application, which required correspondence,<sup>86</sup> could take anywhere between four and fifteen months before he could take legal action.<sup>87</sup>

### III. HOLDING OUT FOR A COPYRIGHT REGISTRATION HERO

While the Supreme Court's statutory interpretation is undoubtedly correct, the troubling implications are undeniable. But who is in the best position to remedy these issues? Many, including the Supreme Court, believe that Congress is the obvious choice.<sup>88</sup>

#### A. Statutory Language Amendment

The Office processes hundreds of thousands of copyright registrations a year,<sup>89</sup> and the enacted language of the Copyright Act is simply ineffective for modern day expectations.<sup>90</sup> Both the Supreme Court and other copyright law professionals suggest that the solution is for Congress to amend the statutory language of § 411(a).<sup>91</sup> Adjusting the language in § 411(a) to provide all works with immediate access to copyright enforcement, regardless of their registration status, is the ultimate motivation for work dissemination.<sup>92</sup> Creators would be more inclined to disseminate their works if they knew not only that their work is protected at origination but also that they may access the courts for immediate relief.

This solution, while ideal for creators, will disincentivize them to apply for copyright registration because there would be no incentive to spend time and

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85. See Dalton, *supra* note 36 (affirming that "the ['Dark Horse'] songwriters earned around \$10 million before expenses and Capitol Records earned \$31 million").

86. Exhibit 2 for Plaintiff's Amended Complaint, *supra* note 24, at 2.

87. *Supra* text accompanying note 32. In Flame's case, his application surprisingly only took just over four months even with correspondence, as it was submitted June 3, 2014, and filed with the court October 6, 2014, presumably just after receiving the official Certificate of Registration. See Exhibit 2 for Plaintiff's Amended Complaint, *supra* note 24.

88. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019); Hartline, *supra* note 57.

89. See FY 2018 REPORT, *supra* note 74 (totaling 560,013 copyright registrations in fiscal year 2018).

90. *Fourth Estate*, 139 S. Ct. at 892.

91. *Id.*; Hartline, *supra* note 57.

92. See Hartline, *supra* note 57 (opining that creators are less likely to disseminate their works when their supposed right to exclude is "in fact illusory").

money to officially register their work. One proponent of this route suggests that, to maintain motivation for copyright registration, Congress should limit the accessible remedies for those without registration.<sup>93</sup> An example of this limitation would be to allow those who have only filed for registration to access the courts but not to recover attorney's fees until registration is issued or denied.

This seems fitting at first; however, there is a problem with its execution. The issue is not whether this change would be effective, but rather, how long it would take for this change to occur. Congress can be a slow-moving machine,<sup>94</sup> and while a congressional fix may be the long-term solution, it is certainly not the only immediate one.<sup>95</sup> Before the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018 (Music Modernization Act),<sup>96</sup> more than ten years had passed since a piece of substantial copyright legislation had been enacted into law.<sup>97</sup> Proposing a change to statutory language in the Copyright Act is not a simple feat and could take years.<sup>98</sup> For example, Congress took a year and three months to amend copyright renewal provisions under the Copyright Renewal Act of 1992.<sup>99</sup> These provisions are similar to the proposed language change to § 411(a). As such, it is reasonable to predict that they may have similar timelines. However, smaller artists cannot afford to wait over a year, as they would face irreparable harm during this intervening wait time.<sup>100</sup>

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93. See *id.* (comparing owners' present lack of available remedies prior to completed registration with the proposed solution of protection for all works with limited remedies).

94. See generally *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> (last visited May 10, 2020) [hereinafter *Legislative Process*] (demonstrating that the process to get bills through Congress runs on a habitually long timeline).

95. See *id.* (illustrating that it takes a long time to implement change).

96. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

97. See Keith Kupferschmid, *Copyright Law in 2018: 2 Bills Become Law, 3 Pending for 2019*, COPYRIGHT CLEARANCE CTR.: VELOCITY OF CONTENT (Jan. 16, 2019), <https://www.copyright.com/blog/copyright-law-in-2018-2-bills-become-law-3-pending-for-2019/> (mentioning that just before the Music Modernization Act, the Marrakesh Treaty Implementation Act of 2018 actually ended the dry spell).

98. *Legislative Process*, *supra* note 94.

99. Copyright Renewal Act, Pub. L. No. 102-307, 106 Stat. 264 (1992) (eliminating registration renewal to continue copyright protection for a second term).

100. See Daniels, *supra* note 21 (expressing that not only did Flame suffer irreparable harm through economic losses, but also from the irreparable tarnishing of his track's reputation, as it was associated with witchcraft and black magic conjured in "Dark Horse").

*B. Budgetary and Staffing Increase*

The Supreme Court restated the Office's assertion that budgetary and staffing shortages are at fault for the delays in copyright registration.<sup>101</sup> To increase the Office's budget for fiscal year 2020, the Office must justify this increase to the Appropriations Committee within Congress.<sup>102</sup> For fiscal year 2019, the Appropriations Committee funded the Office with \$93.4 million.<sup>103</sup> The justifications for this budget focused on the Office's Information Technology (IT) modernization efforts, staffing for core registration services, and contract support.<sup>104</sup> For fiscal year 2020, the Office requests \$92.9 million in funding, with this year's focus being its IT modernization.<sup>105</sup>

The Office's increased congressional appropriations and diligent modernization efforts have resulted in both staff restoration<sup>106</sup> and decreased processing times.<sup>107</sup> However, it is relevant that the number of copyright

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101. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

102. See generally *Legislative Branch Appropriations for Fiscal Year 2020, Before the S. Subcomm. on Legis. Branch of the Comm. on Appropriations*, 116th Cong. 10 (2019) (Statement of Karyn Temple, Acting U.S. Register of Copyrights), <https://www.govinfo.gov/content/pkg/CHRG-116shrg89104854/pdf/CHRG-116shrg89104854.pdf>; *Part 2: Fiscal Year 2020 Legislative Branch Appropriations Requests, Before the H. Subcomm. on Legis. Branch of the Comm. on Appropriations*, 116th Cong. 264, 266 (2019) [hereinafter *FY 2020 Request H. Subcomm.*] (Statement of Karyn Temple, Acting U.S. Register of Copyrights), <https://www.govinfo.gov/content/pkg/CHRG-116hhr36866/pdf/CHRG-116hhr36866.pdf> (presenting these justifications via the Librarian of Congress's Budget Justification and the Register's written testimony).

103. Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, 132 Stat. 2897, 2938–39 (2018); see also IDA A. BRUDNICK & SARAH J. ACKMAN, CONG. RESEARCH SERV., R45214, LEGISLATIVE BRANCH: FY2019 APPROPRIATIONS 18 (2018), <https://crsreports.congress.gov/product/pdf/R/R45214> (reflecting that the \$43.6 million enacted funds for fiscal year 2019 were \$5 million more than requested and \$15 million more compared to fiscal year 2018 appropriations).

104. *Legislative Branch Appropriations for Fiscal Year 2019, Before the S. Subcomm. on Legis. Branch of the Comm. on Appropriations*, 115th Cong. 5–6 (2018) (Statement of Carla Hayden, Librarian of Congress), <https://www.govinfo.gov/content/pkg/CHRG-115shrg89104823/pdf/CHRG-115shrg89104823.pdf>.

105. *FY 2020 Request H. Subcomm.*, *supra* note 102, at 265.

106. See Letter Response Cong. Inquiries, *supra* note 12, attach. 1 at 1 (affirming that the Office suffered a significant decrease in staff after 2010, subsequently facing a serious back log of claims, but has increased its staff by 30%).

107. See *id.*, attach. 2 at 8 (decreasing the processing time of all claims since 2017 from eight to five months).



registration claims also increases annually.<sup>108</sup> This increase in copyright claims requires an increase in funding just to maintain the current status quo.<sup>109</sup> Thus, the concern that artists are unable to enforce their copyright protection remains. Smaller artists like Flame need a more immediate fix, and Congress is not the entity for the job.

### C. Regulatory Fix

The Office is an independent federal department within the Library of Congress, which is a part of Congress as a whole.<sup>110</sup> Congress is a governmental authority explicitly excluded from the Administrative Procedure Act's (APA's) definition of an agency.<sup>111</sup> Although the Library of Congress—and accordingly the Copyright Office—may not be considered administrative agencies, both have hybrid characteristics since they perform functions deemed legislative and executive.<sup>112</sup> Under the Register, the Office has rightfully taken several administrative actions to improve process efficiency.<sup>113</sup>

Under the Copyright Act, Congress grants the Register notice-and-comment rulemaking authority to carry out her administrative functions and responsibilities.<sup>114</sup> The APA regulates the Register's rulemakings and,

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108. See FY 2018 REPORT, *supra* note 74, app. at 21 (documenting the most recent increase of 23% from 2017 to 2018).

109. See *id.* (deducing that an increase in claims requires an increase in appropriations to fund the higher demand).

110. *Overview of the Copyright Office*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/> (last visited May 10, 2020); see also *Green v. U.S. DOJ*, 392 F. Supp. 3d 68, 96–97 (D.D.C. 2019) (supporting this assertion in a failed Administrative Procedure Act (APA) challenge to the Digital Millennium Copyright Act).

111. Under the APA, the term agency refers to “each authority of the Government of the United States . . . but does not include . . . the Congress[.]” 5 U.S.C. §§ 551(1), 701(b)(1) (2018).

112. *Green*, 392 F. Supp. 3d at 96–97; *Ethnic Emps. of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985) (“[T]he Library is not an agency under the Administrative Procedure Act”); see also *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> (last visited May 10, 2020) (stating that the Office administers copyright law, maintains the public records, assists Congress and Executive Branch agencies, and provides public services).

113. See 17 U.S.C. § 701(e) (2018) (“[A]ll actions taken by the Register under this title are subject to the provisions of the Administrative Procedure Act . . .”). See *generally Rulemakings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/> (last visited May 10, 2020) (implementing changes through regulatory rulemakings).

114. 17 U.S.C. § 702 (noting that all regulations must be consistent with established laws and are subject to the Librarian of Congress).

accordingly, requires an open public process.<sup>115</sup> To comply, the Register first posts a Notice of Proposed Rulemaking (NPRM) in the Federal Register and on the Office's public-facing website.<sup>116</sup> The Register then solicits written public comments on the proposed rule through a comment period.<sup>117</sup> The Office can extend this period and post a revised NPRM pursuant to public comments.<sup>118</sup> Finally, the Register will issue a final rule in the Federal Register and on its website.<sup>119</sup> The Register may issue an interim rule to provide some change in the meantime, and may also correct a final rule and issue a revised final rule.<sup>120</sup> The Office issues different types of rulemakings depending on whether the rulemaking involves another Act.<sup>121</sup> An open rulemaking relates to a proposed rule in the notice-and-comment process that is not yet final, whereas a closed rulemaking indicates that the rulemaking process is complete and the Register issued a final rule.<sup>122</sup> This Comment discusses previous open and closed rulemakings, highlighting a variety of rulemakings.

### 1. *Past Action*

In the past, the Office has made several rules targeted at improving different aspects of copyright registration.<sup>123</sup> For example, the Office issued

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115. OFFICE OF THE FED. REGISTER, GUIDE TO RULEMAKING PROCESS (2011), <https://www.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf>.

116. *Id.*

117. *Id.*

118. *See Copyright Office Fee Schedule*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/feestudy2018/> (last visited May 10, 2020) (showing that the initial Notice of Proposed Rulemaking (NPRM) for the Office's proposed new fee schedule was May 2018, with an extended comment period taking place in June 2018, followed by a revised NPRM in June 2019).

119. *See Discontinuance of Form CO in Registration Practices*, 77 Fed. Reg. 18,705 (Mar. 28, 2012) (codified at 37 C.F.R. pts. 201–202) (issuing the final rule).

120. *See Freedom of Information Act Regulations*, 82 Fed. Reg. 9505 (Feb. 7, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-02-07/pdf/2017-01770.pdf> (issuing an interim rule relating to its procedures under The Freedom of Information Act (FOIA)); *see also Discontinuance of Form CO in Registration Practices*, 77 Fed. Reg. 20,988 (Apr. 9, 2012), <https://www.copyright.gov/fedreg/2012/77fr20988.pdf> (issuing a correction to the final rule).

121. *See Freedom of Information Act Practices and Procedures*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/foia2016/> (last visited May 10, 2020) (starting with public comments via a Notice of Inquiry, followed by an interim rule, and then final rule); *see also Final Rule Regarding Noncommercial Use Exception to Unauthorized Uses Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/> (last visited May 10, 2020) (starting with Notice of Inquiry, followed by NPRM, and a final rule).

122. *See generally Rulemakings*, *supra* note 113 (listing open and closed rulemakings).

123. *See id.* (creating new registration forms and adjusting elements to certain registration processes to improve the copyright registration system for applicants).

a final rule that discontinued Form CO.<sup>124</sup> It took this action because, although only a small percentage of applications used Form CO, those applications contained a significant number of errors and required “a disproportionate amount of the Office’s time, effort, and resources to process.”<sup>125</sup> The Office noticed a logistical error affecting processing times, took rulemaking action to remedy it, gave notice-and-comment, and implemented its final rule all within ten months.<sup>126</sup> Additionally, the Office has issued a variety of final rules that directly affect the registration application process,<sup>127</sup> including a final rule simplifying the regulations governing deposit requirements.<sup>128</sup> In that case, the Office recognized that a particular registration requirement demanded more than what was actually necessary to register the work and therefore changed the requirement to “improve the efficiency of registration . . . for both the Office and copyright owners alike . . . .”<sup>129</sup>

The Office has taken previous rulemaking action to provide procedures for new copyright developments.<sup>130</sup> In 2018, Congress passed the Music Modernization Act, which established an exception for certain noncommercial uses of pre-1972 sound recordings permitted after conducting a good faith and reasonable search.<sup>131</sup> The Office responded to the new law with a proposed rulemaking identifying the necessary steps users should take to ensure they made a good faith, reasonable search and providing a cross-reference for users to determine whether his or her search

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124. Discontinuance of Form CO in Registration Practices, 77 Fed. Reg. at 18,706–07 (explaining that “Form CO” was a specific term used for a registration form that required applicants to complete online then print out and mail in).

125. See *Discontinuance of Form CO in Registration Practices*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/formco/> (last visited May 10, 2020) (replacing this option with the choice to file online or with subject matter forms).

126. Discontinuance of Form CO in Registration Practices, 77 Fed. Reg. at 18,705.

127. See *Rulemakings*, *supra* note 113 (rulemakings on group registration options, streamlining payment processes, simplifying registration requirements, and technical amendments to regulations governing services such as registration, recordation, and licensing).

128. See *Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions*, 83 Fed. Reg. 2371, 2371 (Feb. 16, 2018) (codified at 37 C.F.R. pt. 202) (allowing one copy of the best edition of the work, with the right to demand a second copy for literary monographs, rather than automatically requiring two copies).

129. *Id.*

130. See 37 C.F.R. § 201.37 (2019) (codifying new regulation created pursuant to the Music Modernization Act); *The Music Modernization Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/> (last visited May 10, 2020).

131. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018).

is sufficient.<sup>132</sup> The Office recognized the impact this new law would have on users and issued a final rule directly addressing congressional action within six months of giving notice.<sup>133</sup> These rulemakings demonstrate that the Office has the ability to quickly and efficiently recognize and rectify inadequacies in its processes.

## 2. *Present Action*

The Office is working on several new rulemakings that will ease the registration process internally and externally.<sup>134</sup> It is taking a big step to improve internal efficiency by modernizing its registration procedures.<sup>135</sup> This is not an overnight transformation and, thus, the Office issued an interim rule—Modernizing Copyright Recordation—which took effect December 2017.<sup>136</sup> This interim rule updated the Office’s regulations for recording transfers of copyright ownership under 17 U.S.C. § 205, and termination under §§ 203, 304(c) and 304(d).<sup>137</sup> More specifically, this interim rule implements certain aspects of the proposed improvements associated with the new electronic system that are practicable with the current paper recordation system.<sup>138</sup>

Not only is the Office focused on improving internal procedures but it is also dedicated to simplifying the registration process for applicants. A rule, Group Registration of Works on an Album of Music, recently underwent the notice-and-comment period.<sup>139</sup> Under this proposed rule, artists can register up to twenty sound recordings or musical works in an album provided that

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132. Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 84 Fed. Reg. 1661, 1661, 1676–77 (proposed Feb. 5, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-05/pdf/2019-00873.pdf>.

133. Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 84 Fed. Reg. 14,242, 14,242, 14,255–56 (Apr. 9, 2019) (codified at 37 C.F.R. pt. 201) (including “three rounds of public comments”).

134. See generally *Rulemakings*, *supra* note 113, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/> (last visited May 20, 2020) (listing open rulemakings).

135. See, e.g., Registration Modernization, 85 Fed. Reg. 12,704 (proposed Mar. 3, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-03/pdf/2020-04435.pdf>; *Registration Modernization*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/reg-modernization> (last visited May 10, 2020) (utilizing rulemaking to modernize the Office’s procedures).

136. See 82 Fed. Reg. 52,213, 52,213, 52,219–20 (Nov. 13, 2017) (codified at 37 C.F.R. pt. 201).

137. *Id.* at 52,218–20.

138. See *id.* at 52,213 (changing, clarifying, and improving a “time-consuming and labor-intensive” system).

139. 84 Fed. Reg. 22,762, 22,762 (proposed May 20, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-05-20/pdf/2019-10166.pdf>.

the works have at least one author in common and the claimant is the same for all of the works within the group registration.<sup>140</sup>

Under the current rules, if Flame wanted to register one of his albums comprised of more than ten songs exclusively authored by him, he would have to divide his album into multiple group registrations of unpublished works. However, under this proposed rule, Flame could register his entire album as one group registration regardless of how many authors are involved, so long as he is a common author in each song and the claimant for his album. This recent proposed rulemaking demonstrates that the Office acknowledges when registration processes are too complicated or time consuming and takes timely action to remedy shortcomings through regulatory, technical, and practice changes.<sup>141</sup>

### 3. Future Action

In light of the *Fourth Estate* holding, the Office responded to congressional inquiries regarding registration.<sup>142</sup> In its response, the Office explained why registration processing times are currently slow and outlined its plans to improve the processing times.<sup>143</sup> This included completing ongoing and future initiatives.<sup>144</sup>

In fiscal year 2016, the Office received funding to hire twenty examiners and again received funding for an additional fifteen examiners in fiscal year 2018 and 2019.<sup>145</sup> Due to hiring additional examiners, revamping the examiner training program, and using examiner overtime wisely, the Office has steadily reduced its number of “claims on hand,”<sup>146</sup> making up for the

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140. *See id.* at 22, 767–68 (extending this to literary, pictorial, and graphic works associated with the album).

141. *See* Letter Response Cong. Inquiries, *supra* note 12, attach. 2 at 12–17, 20–24 (explaining the Office’s implemented changes to address its registration challenges).

142. *See generally id.* attach. 1 at 1–5 (answering questions from Congress on what steps the Office plans to take to improve registration processing times).

143. *Id.* attach. 2 at 1–3, 12–17, 20–25.

144. *Id.* attach. 3 at 1, 4–7 (continuing the ongoing initiatives to increase staffing, streamline training processes, use overtime responsibly, continue an HOV process, and implement a modernized online registration system). Future initiatives include additional staffing plans, adjusting performance goals, evaluating regulatory, policy and practice updates, and other organization-wide initiatives. *Id.* at 1.

145. *Id.*

146. *See id.* (defining “claims on hand” as all claims, including “workable claims” and claims waiting for deposits, which the Office cannot touch until all application elements are complete).

backlog of claims.<sup>147</sup> Additionally, the Office plans to create positions to assist with workflow and to handle difficult claims requiring correspondence.<sup>148</sup>

In 2018, the Office launched a “HOV initiative”<sup>149</sup> that instructed examiners to address the oldest claims first and resolve error-free claims requiring no correspondence prior to handling the claims requiring correspondence.<sup>150</sup> With this process, it resolved 92.4% of its oldest claims in fiscal year 2018.<sup>151</sup> Although resolving these older claims is helpful, they represent less than 1% of all claims received annually and accordingly will only affect a minute number of applicants, which will not meaningfully alleviate post-*Fourth Estate* concerns.<sup>152</sup> The Office also plans to subdivide electronic claims into two categories; one of applications with electronic deposits and the other with physical deposits.<sup>153</sup> The Office’s goals to modernize and improve current procedures seem promising; however, the new strategic plan lays out its efforts for the next five years,<sup>154</sup> which will likely be too late for many artists seeking near-term relief.

#### IV. RECOMMENDATION

The Office’s past, present, and future rulemakings continue to improve registration efficiency.<sup>155</sup> However, these improvements have not resolved the post-*Fourth Estate* concern that smaller artists, like Flame, will not be able to timely enforce their exclusive authorship when necessary. This Part suggests that the best solution to providing relief to these applicants is to make the Office’s expediting options, specifically special handling, actually accessible to all applicants through a fee reduction or waiver based on financial need.

In the Federal District Courts and Courts of Appeals, indigent parties to a lawsuit are able to apply for a filing fee waiver through *in forma pauperis* (meaning “in the form of a pauper”).<sup>156</sup> All courts in the United States are

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147. *Id.* (reducing claims by about 2,000 claims a week over the last two years).

148. *Id.* at 1, 4–5.

149. *Id.* at 1, 3–4 (naming the initiative “HOV” because examiners sent the oldest claims directly to Office leadership, which allowed these older claims to proceed in a different, faster lane from all other claims—like a high-occupancy vehicle lane).

150. *Id.* at 1, 3–4.

151. *Id.* attach. 3 at 3–5 (expressing its dedication to resolve all claims submitted before 2018).

152. *Id.* at 3–4.

153. *Id.* at 6–7 (demonstrating the slower processing of physical deposits).

154. *See generally id.* at 4 (discussing its modernization initiatives).

155. *Id.* attach. 2 at 23–24.

156. FED. R. APP. P. 24(b) (allowing parties to also proceed *in forma pauperis* on appeal from the U.S. Tax Court and from review of an administrative agency proceeding).

authorized to commence any civil or criminal action without prepayment of fees.<sup>157</sup> To proceed *in forma pauperis*, a party must submit an affidavit detailing his or her inability to pay, “stat[ing] the issues the party intends to present,” and “claim[ing] an entitlement to redress.”<sup>158</sup> Many courts clarify that, to establish an inability to pay, a party must demonstrate that paying the filing fees would create a substantial hardship for him or her.<sup>159</sup> For example, to demonstrate this hardship requirement, the Superior Court of the District of Columbia requires *in forma pauperis* applicants to notate whether they receive public benefits, their total income over the past year, their employment status, the number of dependents they support, assets they own, and monthly expenses.<sup>160</sup> Authorizing *in forma pauperis* filings gives courts the liberty to create a real solution for financially needy parties attempting to access their rights to file claims.

#### A. *The Copyright Office’s Authority*

The Register is authorized to set filing fees based on the cost of providing specific services.<sup>161</sup> Section 708 of the Copyright Act also authorizes the Register to adjust current filing fees.<sup>162</sup> To do so, the Register must propose a new fee schedule—via an open rulemaking—pursuant to a study initially conducted by the Office to determine the actual costs of providing these fee-based services.<sup>163</sup> The Office’s proposed fee schedule is subject to congressional approval.<sup>164</sup> However, rather than requiring Congress’s explicit approval, the proposed fee schedule automatically goes into effect 120 days after the Register submits the proposal to Congress provided that Congress does not enact a law within that time period disapproving the proposed fee schedule.<sup>165</sup>

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157. 28 U.S.C. § 1915(a), (c) (2018).

158. FED. R. APP. P. 24(a)(1).

159. D.C. SUPER. CT. CIV. APP’X OF FORMS, Form 106A at 1–2, <https://www.dccourts.gov/sites/default/files/2017-05/Revised%20Form%20106A%20September%202019.pdf> (last updated Sept. 2019).

160. *Id.*

161. *See* 17 U.S.C. § 708(a) (2018) (registering claims, recording documents, and searching records).

162. *Id.* § 708(b).

163. *See id.* § 708(b)(1)–(2), (5) (noting that Congress regulates these suggested adjustments); *see also* U.S. COPYRIGHT OFFICE, PROPOSED SCHEDULE AND ANALYSIS OF COPYRIGHT FEES TO GO INTO EFFECT IN SPRING 2020 1, 6 (2019), <https://www.copyright.gov/rulemaking/feestudy2018/proposed-fee-schedule.pdf> (adjusting its fees every three to five years).

164. 17 U.S.C. § 708(b)(5).

165. *Id.*

Because the Office has the authority to create, increase, or decrease fees, it is within its authority to provide applicants with a fee waiver or reduction for expediting options.<sup>166</sup> The Copyright Act requires that the Office's fee determinations be "fair and equitable" by giving consideration to the copyright system's objectives and only accounting for what is necessary to recover reasonable costs.<sup>167</sup> This Part proposes that a fee waiver or reduction for special handling requests aligns with the copyright system's objectives and does not threaten the Office's ability to recover reasonable costs.

### 1. *Copyright System's Objectives*

Copyright law's primary purpose is not to protect authorship, but to encourage creation.<sup>168</sup> The United States' method of encouraging creation is through economic incentivization.<sup>169</sup> The copyright system was established to provide creators with the necessary protection—in the form of exclusive rights—to encourage them to create.<sup>170</sup> This exclusive authorship, albeit temporary, allows creators to control who accesses their creations and reap the fruits of their intellectual labor.<sup>171</sup> Copyright law motivates creators to further generate and disseminate, which ultimately benefits society as a whole.<sup>172</sup>

All creators, from the more obscure artists like Flame to worldwide popstars like Katy Perry, can dedicate their careers to creating original works because they are compensated for doing so. Exclusive authorship makes this possible. Within the copyright system, exclusive authorship treats copyrighted works as private property.<sup>173</sup> Thus, creators can restrict or

166. 37 C.F.R. § 201.3 (2019); *see, e.g.*, 37 C.F.R. § 203.11 (allowing fee waivers in Freedom of Information Act claims).

167. 17 U.S.C. § 708(b)(2), (4).

168. *See Overview of the Copyright Office*, *supra* note 110 (asserting that the "Copyright Office promotes creativity and free expression by administering the nation's copyright laws").

169. *See A Brief Introduction and History*, *supra* note 112 (stating that "a principle of American law" is that a creator can "reap the fruits of his or her intellectual creativity"); *see also* Vishnu S. Warriar, *Public Interest Issues in Copyright*, 9 THE LEX-WARRIER: ONLINE L.J. 97, 97–98 (2018) (noting that the four principles of U.S. copyright law are: to provide authors control over their works; to compensate authors for their labor and creations; that monetary compensation will encourage creators to generate more works; and that work dissemination benefits society); *Copyright's Purpose: What Copyright is For*, U. MINN. LIBR., <https://www.lib.umn.edu/copyright/> (last visited May 10, 2020) [hereinafter *Copyright's Purpose*] (claiming U.S. copyright law focuses on "economic incentives" and "social progress").

170. Warriar, *supra* note 169, at 97.

171. *See Copyright's Purpose*, *supra* note 169 (suggesting that copyright law's purpose is to incentivize creators through control of and payment for their works).

172. *Id.*

173. *See Warriar*, *supra* note 169, at 97 (granting creators a monopoly to exploit their works).



exclude others from using their works without consent, and allow others to exploit their works for a price.<sup>174</sup> However, exclusive authorship is irrelevant if creators cannot enforce their rights when others exploit their work without permission. Creators need the assistance of both the Office and the courts to enforce their exclusive authorship.<sup>175</sup>

The Office is the “office of record” for copyrights and, therefore, is responsible for providing creators with proper documentation to represent their exclusive authorship.<sup>176</sup> Although the Office is making every effort to decrease registration processing times, the wait is still several months, and copyright infringers do not run on government agency timelines. The Office’s expedited registration options—which reduce registration times from several months to several days—are critical for those facing copyright infringement.<sup>177</sup> Because special handling has a flat fee of \$800, this crucial solution for those facing irreparable harm continues to be an elite service available only to those who can pay to play. Consequently, creators are disincentivized from generating and disseminating their works for fear of infringement and the likely outcome of being unable to access a timely remedy. This realistic fear directly conflicts with the copyright system’s purpose. However, granting a fee waiver or reduction for qualifying special handling requests will dissolve this fear and reinforce the copyright system’s objectives.

## 2. *Recovering Reasonable Costs*

Congress limits the Office to recover only reasonable costs incurred from providing fee-based services.<sup>178</sup> But Congress does not define what is reasonable. The Office asserts that its goal is to recover a “significant portion” of its costs—and it further details in its proposed fee schedule where these costs may be recovered.<sup>179</sup> Because preregistration and special handling are the only expediting options,<sup>180</sup> we will compare these costs, revenues, and cost recoveries.

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174. *Id.* at 97–98.

175. Creators must have completed registration to file a claim in court, which requires the Office to issue or deny registration and courts to take action once a claim is filed. CIRCULAR 1, *supra* note 51, at 4–5, <https://www.copyright.gov/circs/circ01.pdf> (last visited Feb. 14, 2020).

176. *A Brief Introduction and History*, *supra* note 112.

177. See Letter Response Cong. Inquiries, *supra* note 12, attach. 2 at 8, 10–11.

178. 17 U.S.C. § 708(b)(2) (2018).

179. *Copyright Office Fee Schedule*, *supra* note 118.

180. See discussion *supra* Part II.B–C (noting that both options process each claim within five business days, but preregistration is a less thorough process because it is only a registration “place-holder”).

In 2017, the Office received 986 preregistration claims and 2,281 special handling requests.<sup>181</sup> The current cost recovery is 197% for preregistration and 1,197% for special handling.<sup>182</sup> Listed in the Office's fee study model—which served as the basis for the proposed fee schedule—is its projected new revenue for preregistration, \$183,600,<sup>183</sup> and special handling, \$2,190,000.<sup>184</sup> Understandably, optional services should have a steeper filing fee and larger cost recovery compared to necessary services like standard applications.<sup>185</sup> However, it is surprising and confusing that the difference in fees and cost recovery between the two expediting options is so drastic, especially when the preferred method is the less affordable option. The Office's calculated cost-incurred-per-preregistration claim is higher than that of a special handling claim, yet the special handling fee is steeper.<sup>186</sup>

Granting a fee reduction for qualifying special handling applicants will require increased cost recovery from other services. The Office could recover a larger percentage of preregistration costs, which would help maintain its current and projected overall cost recovery while allowing special handling fee reductions. Additionally, the Office could increase the fee for additional services, such as its other optional service—requests for reconsideration (appeals).<sup>187</sup> Currently, the cost recovery for a first appeal is 34% (projected to change to 45%) and the cost recovery for a second appeal is 11% (projected to change to 15%).<sup>188</sup> A second appeal is a less essential service than special

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181. See BOOZ ALLEN HAMILTON, FEE STUDY REPORT 25 (2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_report.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf) (amounting to \$138,040 in revenue for preregistration and \$1,824,800 for special handling).

182. U.S. COPYRIGHT OFFICE, FEE STUDY MODEL 2 (2017) [hereinafter FEE MODEL], [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_model\\_summary.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_model_summary.pdf).

183. *Id.* at 4 (hypothesizing a volume of 918 requests).

184. *Id.* (hypothesizing a volume of 2,190 requests). The projections show an increase in cost recovery metrics for preregistration from 197% to 262% and special handling from 1,197% to 1,437%. *Id.* at 2, 4.

185. See 2020 FEE SCHEDULE, *supra* note 31, at 1–2 (listing the standard application's fee of \$65); FEE MODEL, *supra* note 182, at 2–4 (noting a current cost recovery of 61% and projected 73% for the standard application).

186. See FEE MODEL, *supra* note 182, at 3 (comparing a cost of \$71 per preregistration claim to \$67 per special handling claim).

187. See U.S. COPYRIGHT OFFICE, CIRCULAR 20: REQUESTS FOR RECONSIDERATION (2017), <https://www.copyright.gov/circs/circ20.pdf> (allowing applicants to appeal a registration denial); see also 2020 FEE SCHEDULE, *supra* note 31, at 2 (illustrating the Office's recent decision to increase the first and second appeals fees by \$100 and \$200 respectively).

188. See FEE MODEL, *supra* note 182, at 3 (calculating that a first appeal costs the Office \$729 but only charges a \$350 fee, and a second appeal costs \$4,470 but only charges \$700).

handling, yet is currently more accessible.<sup>189</sup> The Office has taken action on the claims of creators applying for a second appeal; those creators can file suit for copyright infringement, whereas applicants who are unable to pay the special handling fee are forced to wait for completed registration before having access to courts.<sup>190</sup> The Office should reevaluate which of its services are most essential for applicants and therefore should be more accessible, regardless of economic status, and then adjust its fees and recovery costs accordingly.

### B. *In Forma Pauperis*—Copyright Style

The Register should propose a notice-and-comment rulemaking to institute a fee reduction form to accompany special handling requests. This would be available only to those who are facing pending or prospective litigation and meet the economic qualifications. This proposed rulemaking is the strongest recommendation thus far and is action the Office would likely take, as it is the only recommendation that promotes the Office's objectives without threatening its sustainability, provides artists like Flame with a viable and speedy solution, and suggests actions that an agency can realistically implement.

This proposed rule would require the Office to review both the reduced fee and special handling forms before deciding whether to grant both requests and proceed *in forma pauperis*, grant only the special handling request, or deny both requests. As stated above, to proceed *in forma pauperis* in court, parties must (1) detail their inability to pay, (2) state their legal issues, and (3) claim their entitlement to a remedy.<sup>191</sup> The special handling fee reduction form would require applicants demonstrate all three of these elements. First, to demonstrate an inability to pay the \$800 fee, applicants would provide—among other required metrics—public benefit status, yearly income, employment status, domicile, and assets and expenses.<sup>192</sup> Second, to sufficiently state their legal issue, applicants would indicate whether the litigation is actual or prospective, whether the applicant is the plaintiff or defendant, and the names of the parties and court where the litigation is pending or expected.<sup>193</sup> Third, to satisfy the remedy requirement, applicants would state what remedy they claim from litigation. Applicants would also include a signed statement certifying that the provided information is true,

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189. *Id.* (comparing a \$700 fee for a second appeal to a \$800 fee for special handling).

190. *See* 17 U.S.C. § 411(a) (2018) (requiring copyright issuance or denial to file suit for infringement).

191. *Supra* text accompanying note 158.

192. *Supra* text accompanying notes 158–60.

193. *See* CIRCULAR 10, *supra* note 62, at 1 (noting that the current special handling request form requires this exact information for those applying due to “pending or prospective litigation”).

to the best of their knowledge.<sup>194</sup> If the Office were to discover any asserted information to be false, it could dismiss the pending request; or, if the request was already granted, it could require the applicant to pay back any reduced or waived fee.

If the Office were to issue this rulemaking, a partial payment system based on applicants' estimated inability to pay is advised for two purposes: to discourage frivolous requests,<sup>195</sup> and to provide relief to smaller artists—like Flame—who do not qualify for a fee waiver because, while they are unable to pay the full fee, they are not among the most indigent applicants.<sup>196</sup> The Register would pre-establish varying fee amounts based on an applicant's total income assessed over twelve months, current assets, and monthly expenses.<sup>197</sup> These pre-established partial payments would provide examiners with guidelines to follow when assessing an applicant's inability to pay and what fee amount is reasonable.<sup>198</sup> However, each request would be determined on a case-by-case basis so that applicants are only required to pay an amount that is "economically feasible" and prevents undue hardship.<sup>199</sup> The Office would then inform applicants of its determination prior to examining the claim because an applicant who received a fee reduction would be required to pay the reduced fee before the Office could take action.<sup>200</sup> The Office could reassess its partial payment system every three years as a part of its new fee schedule, adjusting the preestablished amounts based on varying influential factors.<sup>201</sup>

If the Office permits reduced or waived fees for special handling, there may be pressure for the Office to issue the same for other services. However,

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194. *Id.* at 3.

195. See Mary Van Vort, Note, *Controlling and Deterring Frivolous in Forma Pauperis Complaints*, 55 *FORDHAM L. REV.* 1165, 1183–85 (1987) (stating that partial payment procedures force applicants to assess the merit of their claim to deter frivolous and meritless complaints).

196. Paying \$800 solely to gain access to a potential remedy is a steep fee even for non-needy applicants who do not have \$800 at their disposal. Van Vort, *supra* note 195, at 1185–87.

197. Van Vort, *supra* note 195, at 1183–84 (differing from courts' assessment, which requires months of auditing to determine what amount is appropriate, to provide applicants with a more immediate answer).

198. *In re Williamson*, 786 F.2d 1336, 1340 (8th Cir. 1986) (holding that the reduced fee should be "a small, but fixed, percentage" of an applicant's assets or average monthly income).

199. See Van Vort, *supra* note 195, at 1183 n.112 (giving great discretion to courts to determine economic feasibility or hardship, favoring a case-by-case approach).

200. See *CIRCULAR 4*, *supra* note 27, at 1, 7 (requiring fee-based services to be paid prior to fulfilling a service because the fee compensates for the associated costs).

201. See generally *Copyright Office Fee Schedule*, *supra* note 118 (considering factors, such as the actual costs of services, anticipated future expenses, inflation, and demand for services, when adjusting its fees).

allowing applicants to proceed *in forma pauperis* is an equitable solution that should be limited to a specific copyright threatening situation—pending or prospective litigation—where a creator’s financial status should not, but currently does, determine when he or she can enforce those protective rights.<sup>202</sup> Fees associated with the Office’s services are necessary to its sustainability. Thus, to balance the need for financial contribution and protecting creativity, a fee reduction or waiver should be limited only to those who satisfy the requirements and are facing irreparable harm necessitating immediate enforcement. Furthermore, providing an economically viable option through a reduced or waived fee will resolve smaller artists’ post-*Fourth Estate* doubts because it will afford them a real safeguard when facing copyright infringement. This recommendation does not ask the Office to do the impossible by reducing registration processing times to a month, nor hinder the Office’s sustainability by providing a fee waiver to all special handling applicants or other services. In contrast, it merely suggests that the Office consider equity in its procedures and propose a rulemaking that turns an unattainable remedy into a practical solution.

#### CONCLUSION

Allowing qualifying applicants to proceed *in forma pauperis* with special handling claims would promote equity; thus providing smaller artists like Flame with a realistic method to enforce their statutory rights. This option would encourage artists to create and disseminate their original works since they would know that, if they are infringed upon, there is a meaningful remedy available. Thus, issuing this rulemaking would support the Office’s mission to “promote[] creativity and free expression,”<sup>203</sup> align with the constitutional goal of “promot[ing] the progress of science and useful arts,”<sup>204</sup> and benefit society.

This Comment does not suggest that Congress should not amend § 411(a)’s language or continue to increase the Office’s budget. Rather, it recommends that, in the interim, the Office should take agency action to resolve this issue that artists are currently facing. Absent a drastic decrease in registration times—which seems to be rather unattainable—a fee reduction is the best solution in that it equally encourages creation and

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202. Creators unable to afford expediting options have no choice but to wait for the Office to issue or deny registration prior to taking the first step—filing a claim—to enforce their copyright. See CIRCULAR 4, *supra* note 27, at 4 (listing the only expediting options with steep fees); see also *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019) (requiring Office action prior to filing a claim).

203. *Overview of the Copyright Office*, *supra* note 110.

204. U.S. CONST. art. I, § 8, cl. 8.

maintains a sustainable copyright registration system. Artists fear the risk of copyright infringement daily. Now, post-*Fourth Estate*, they are forced to wait, unable to enforce these automatic rights, until the Office acts. To encourage smaller artists to continue creating and to provide them with the tools necessary to protect their creations, there must be some sort of exception carved out through agency rulemaking. A proposed rulemaking for special handling fee reductions with the above criteria would minimally change examiners' duties, implement a simple fee reduction form, and provide artists facing infringement with a timely solution.