

No. 08-103

IN THE
Supreme Court of the United States

REED ELSEVIER INC. *et al.*,

Petitioners,

v.

IRVIN MUCHNICK *et al.*,

Respondents,

LETTY COTTIN POGREBIN *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does 17 U.S.C. § 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?

LIST OF PARTIES

There are no additional parties to the proceeding other than those listed in the caption. The first group of respondents identified in the caption (Irvin Muchnick *et al.*) were objectors in the district court and appellants in the Second Circuit. The second group of respondents identified in the caption (Letty Cottin Pogrebin *et al.*) were the plaintiffs in the district court and appellees, along with the defendants, in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Statement in the Petition remains accurate, except that: (1) Dialog Corporation is now known as Dialog LLC; (2) ProQuest Company is now known as Voyager Learning Company; (3) ProQuest Information and Learning Company is now known as ProQuest, LLC; and (4) the list of the corporate parents and other publicly held companies owning 10% or more of any petitioner's stock should include Cambridge Information Group, Bestinver Gestion SGIIC, S.A., and Acciona, S.A., and not include ProQuest Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 509 F.3d 116 (2d Cir. 2007). Pet. App. 1a. The final judgment of the United States District Court for the Southern District of New York is unpublished and reproduced at Pet. App. 53a and JA 152. The unpublished decision of the district court is transcribed and reproduced at Pet. App. 48a-58a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338, and the Second Circuit had jurisdiction under 28 U.S.C. § 1291. The Second Circuit's opinion was entered on November 29, 2007, and a timely petition for rehearing and rehearing en banc was denied on April 15, 2008. Pet. App. 1a, 59a. On June 9, 2008, Justice Ginsburg extended the time to file a petition for writ of certiorari to and including August 13, 2008. Pet. App. 62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 411(a) of the Copyright Act of 1976, 17 U.S.C. § 411(a), which provides in pertinent part:

[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper

form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

STATEMENT OF THE CASE

This case presents an issue of exceptional importance to the nation's freelance authors, newspaper and magazine publishers, archival databases, and the researching public. Its resolution will decide whether, in connection with the nationwide class action spawned by *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the parties may globally settle their differences by compensating and releasing the claims of freelance authors with respect to all their contributions to the databases. *Tasini* expressly contemplated that databases, publishers, and authors could reach a court-enforceable global settlement. *Id.* at 505. On that basis, the parties and publishers spent over four years of intensive negotiations to reach an industry-wide settlement that was approved under Rule 23.

The Second Circuit, however, upended that agreement on a ground that was not raised by any of the parties. Its sole rationale was that the register-before-instituting-suit provision in § 411(a) of the Copyright Act erected a jurisdictional bar to the

inclusion of unregistered works in any settlement. The court relied almost exclusively on its own precedents to reach that conclusion. But the text, structure, purpose, and legislative history of the Copyright Act, as well as over 200 years of copyright legislation, lack the faintest suggestion that registration is jurisdictional. Nor did the court address *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), which makes plain the error of relying on the type of “drive-by jurisdictional” characterizations contained in those precedents.

By erroneously treating a provision of substantive copyright law as jurisdictional, the Second Circuit’s decision defeats the ability of parties to reach negotiated resolutions of their disputes involving unregistered works. That result disserves the purposes of the Copyright Act, which are rooted in a pragmatic commitment to the values of private ordering. Under the decision below, not only have four years of settlement negotiations been wasted, but it is doubtful that any possible settlement can be achieved, given the prevalence of non-registration among freelance authors, the cost and burden of registration for works of such modest economic value, and the publishers’ lack of information as to which articles were freelance and how to locate those freelance authors years after their articles were first published. Should that decision stand, the nation’s electronic databases and archives will be permanently depleted, a result Congress surely did not intend, and contrary to this Court’s expectation that the archives could be restored by “an agreement allowing continued electronic reproduction of the Author’s works” *Tasini*, 533 U.S. at 505.

1. The issues here arise in the wake of *Tasini*, which held that electronic databases and newspaper and

magazine publishers needed consensual licenses from freelance authors (authors who did not create their works as employees) to reproduce and distribute the contents of newspapers and magazines in electronic archives such as LexisNexis. *Tasini* effectively compelled electronic publishers to purge their databases of many hundreds of thousands of newspaper and magazine articles for which written licenses had not been obtained. Obtaining such licenses retrospectively would be an insuperable task, given the sheer number of authors and works involved and the practical difficulties associated with finding the authors and executing individual agreements with each of them.

2. Following the Second Circuit's *Tasini* decision, more than a score of freelance authors, supported by national authors' rights trade organizations, filed lawsuits against online databases and certain publishers, which were consolidated by the Judicial Panel on Multidistrict Litigation. JA iii, 1, 16, 48, 69.

The actions were all properly commenced under the district court's subject matter jurisdiction. The complaints pleaded copyright infringement claims, invoked jurisdiction under 28 U.S.C. §§ 1331 and 1338(a), and pleaded compliance with the register-before-instituting-suit requirement in 17 U.S.C. § 411(a). JA 3-4, 18-24, 27, 34, 49-58, 69-72. The first two underlying complaints made no reference to unregistered works at all. JA 1, 16. The Consolidated Amended Complaint specified, for each of the 21 individual plaintiffs, the titles of each plaintiff's allegedly infringed articles, and copyright registration number information for each work (except for two plaintiffs

whose works are not U.S. works and therefore require no registration certificate under § 411(a)). JA 83-86, 105.¹ Each of the underlying complaints, and the Consolidated Amended Complaint, asserted claims on behalf of a class of freelance authors comprised of many thousands of authors whose freelance works, written for newspapers and magazines, had been or still were available on the defendant databases.

The consolidated action was suspended pending this Court's decision in *Tasini* and reactivated after that decision. JA iii. Because the publishers had licensed their publications to the defendant databases with representations that they had the necessary rights, backed by promises of indemnity, the databases intended to implead many additional publishers. The district court suggested that all parties attempt to mediate the dispute, and they agreed to do so. JA iii, iv. At that early point, and indeed until the court was presented four years later with a motion to certify the settlement class and approve the settlement agreement, the district court had nothing whatever to do with the alleged class claims or any claims involving unregistered works.

Four years of intensive, complex, and costly mediation ensued. *See* Declaration of Kenneth Feinberg, submitted in the District Court (May 16, 2005) (Ct. of Appeals App'x 608-12). The mediation entailed separate yet interdependent sets of negotiations – between freelance author groups, publishers (and their insurers), and the electronic databases (and their insurers) – in order to agree on terms for compensating freelance

¹ For a few works, the plaintiffs noted that registration had been applied for and was pending.

authors, funding that compensation, and restoring the electronic archives that had been purged of the freelance works implicated by *Tasini*.

3. In March 2005, the authors, databases, and nearly 40 publishers reached a comprehensive settlement agreement. To ensure the complete peace that the defendants and publishers required as a condition to settlement, and which is a usual feature of class-action settlements, the defense group gave freelance authors the right to submit claims for compensation for all freelance articles in the databases for which electronic licenses had not been granted in writing, regardless of whether (a) claims on those articles had been previously asserted in the action, (b) there were oral licenses or other available defenses, (c) the articles had ever been accessed, or (d) copyright in the articles had been registered. Every freelance article in the databases was eligible for compensation pursuant to an agreed-on schedule. Up to \$18 million was set aside to fund those claims. Authors also were entitled to deny future use of their articles. JA 106, 116-36, 150-51.

In exchange, the authors released the defense group from all past, present, and future claims arising from freelance articles that had been in the databases, regardless of registration. JA 113-14, 139-43. Those releases would effectively permit the restoration of hundreds of thousands of articles that had been previously taken down from the databases, as well as the retention of others that would have been taken down but for the settlement. Without the releases, defendants and the publishers would have been forced to purge all articles possibly written by freelance authors so as to avoid future liability.

4. Ten authors, out of the many thousands in the proposed settlement class, objected to the settlement. No one challenged the court's jurisdiction to approve a settlement compensating unregistered works. After carefully considering the objectors' many contentions at a day-long argument, the district court overruled the objections, certified a settlement class of freelance authors under Rule 23(a) and (b)(3), approved the settlement as fair, reasonable, and adequate under Rule 23(e), and entered final judgment. Pet. App. 48a-58a.

5. The objectors appealed, complaining of various alleged procedural and substantive shortcomings in the settlement agreement, but again not arguing any lack of subject matter jurisdiction to approve the settlement. Shortly before argument, the Second Circuit panel *sua sponte* requested briefing on "whether the district court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights." Pet. App. 46a-47a. All parties, including the objectors, responded that the district court had jurisdiction to approve the settlement.

In a split decision, the Second Circuit vacated the class certification and approval of the settlement on the ground that the district court lacked jurisdiction over a class consisting of claims arising from the infringement of unregistered copyrights. Pet. App. 5a, 10a.² The

² The panel's statements that the district court certified "a class consisting of claims" and that the settlement class was *limited* to "claims arising from the infringement of unregistered copyrights" were erroneous. Pet. App. 5a. The district court certified a class of authors whose works had been copied by defendants. JA 153-55. The settlement entitled *all*
(cont'd)

Second Circuit held that compliance with the register-before-suit provision of § 411(a) was jurisdictional, relying mainly on unreasoned dicta in two decisions in which it had previously said so and in six comparable decisions from other circuits. In each of those cases, the courts had used “jurisdictional” to mean “important and enforceable,” and the same disposition would have been reached had § 411(a) been considered mandatory but not jurisdictional.

Overreading circuit precedent that § 411(a) imposes “a jurisdictional prerequisite to the right of the holder to enforce the copyright in federal court,” Pet. App. 19a, the majority held that the registration requirement applied not only to “institut[ing]” suit (the operative verb in § 411(a)) but also to approving a settlement reached by named plaintiffs who complied with the requirement of § 411(a), even though settlement entails no judicial adjudication of claims or grant of copyright remedies for unregistered works. Pet. App. 11a, 20a-24a. Effectively, the Court of Appeals held that the district court lacked jurisdiction to approve any settlement providing any compensation for unregistered works, a holding that presumably applied not only to class members but also to the named plaintiffs. It also held that the district court lacked subject matter jurisdiction to certify a settlement class not limited to registered authors in respect of claims for registered works.

(cont’d)

class-member authors to compensation, not only those who had registered all of their freelance articles claimable under the settlement agreement, but also those who had registered only some of those articles (as was true of the named plaintiffs) or none of them.

The majority rejected the parties' arguments that the plaintiffs complied with § 411(a) and that § 411(a) did not restrict jurisdiction to approve a settlement in a properly instituted case. It held that § 411(a) rigidly "requires that each class member's claim arise from a registered copyright" in order for the district court to approve a settlement agreement providing any relief to the class. Pet. App. 24a. The majority also considered 28 U.S.C. § 1367, holding that it could not be used to avoid § 411(a). Pet. App. 25a-27a.

Judge Walker dissented on the ground that "the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement." Pet. App. 28a. He noted that the Second Circuit had "recent[ly held] that not all members of a settlement-only class need to possess a valid cause of action," *id.* (citing *Denney v. Deutsche Bank A.G.*, 443 F.3d 253 (2d Cir. 2006)), and would have held that § 411(a)'s registration requirement is "more akin to a claim-processing rule than a jurisdictional prerequisite" under *Arbaugh*, 546 U.S. 500, *Bowles v. Russell*, 551 U.S. 205 (2007), *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), and *Kontrick v. Ryan*, 540 U.S. 443 (2004). Pet. App. 28a-29a. Applying the approach laid out in *Arbaugh*, the dissent looked to statutory language, context and structure, purpose, legislative history, and the fact that § 411(a) is "riddled" with exceptions that belie any legislative intent to render it jurisdictional. Pet. App. 30a-36a.

Judge Walker also distinguished the cases relied on by the majority, noting that they concerned the power to *adjudicate* claims, not the power to *settle* a case

already within the court's subject matter jurisdiction. Pet. App. 42a-45a.

During the claims period, which ended September 30, 2005, thousands of freelance authors submitted detailed claim forms seeking compensation with respect to hundreds of thousands of newspaper and magazine articles. Since the Second Circuit's decision, all claims-administration work ceased and has not resumed, and no authors have been paid.

6. Registration is the process by which the Register of Copyrights is notified of copyright ownership claims. The owner must file an application containing certain basic information about the work at issue along with a fee, and must deposit copies of work with the Copyright Office. 17 U.S.C. §§ 408-09. While registration is not required as a condition of copyright protection, the copyright law seeks to induce it by tying registration to several advantages. Among those inducements, (a) registration establishes a public record of the copyright claim,³ (b) an application for registration is necessary before a copyright action for infringement of a United States work may be filed in court, 17 U.S.C. § 411(a), (c) if made before or within five years of publication, registration is *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate, *id.* § 410(c), and (d) registration makes a plaintiff eligible for statutory damages and attorney's

³ See Compendium of the Copyright Office Practices II § 602 ("Compendium II"). Provided for in 37 C.F.R. § 201.1(b)(3) of the Copyright Office Regulations, Compendium II is a manual, initially published in 1978 and updated thereafter, intended primarily for the use of the Copyright Office as a general guide to its examining and related practices.

fees in an infringement action, if made before infringement occurs or within three months after publication, *id.* § 412. Significantly, even if the Register denies the application, the copyright owner may still sue for infringement. *Id.* § 411(a).

Registration applications are reviewed by examiners, who consider the applications and accompanying deposits on their face. If the material reflects copyrightable subject matter and compliance with the formal requirements provided by statute and applicable regulations, the certificate is issued – even if someone else has obtained an existing registration for the same work. If it does not, the examiner will deny the application. In cases of doubt, the application will be granted.⁴ The examiners do not resolve factual disputes. Compendium II §§ 108-108.07.

By statute, registration is *not* required for institution of an infringement action in a variety of situations, including:

- if the work in question is not a U.S. work, 17 U.S.C. § 411(a);⁵
 - if registration has been denied, *id.*;
 - if the claim concerns rights of attribution and integrity under 17 U.S.C. § 106A, *id.*;
- or

⁴ See Compendium II §§ 108.09, 605.05. This is known as the “rule of doubt.” A specific rule of doubt even permits registration for software deposited in a form wholly unexaminable by the Copyright Office. 37 C.F.R. § 202.20(b)(vii)(B).

⁵ U.S. works – broadly speaking, works first published in the United States – are defined in 17 U.S.C. § 101.

- if the work consists of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, *id.* § 411(c).

All of these are express exceptions to the registration requirement.

SUMMARY OF ARGUMENT

As this Court has cautioned, “jurisdiction is a word of many, too many, meanings.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998). The mere fact that a statute imposes a mandatory prerequisite to suit does not mean that it is a jurisdictional requirement, unwaivable and absolute. As this Court has repeatedly held, subject matter jurisdiction must always be distinguished from the elements of a claim for relief. *Arbaugh*, 546 U.S. 500. The Second Circuit failed to heed those teachings, and did not examine this statute from first principles.

A careful analysis of § 411(a) compels the conclusion that registration is a *mandatory* precondition for bringing an infringement action for most works, but not a *jurisdictional* requirement. When Congress seeks to deprive federal courts of jurisdiction to hear cases for which jurisdiction is otherwise broadly granted, it uses the language of jurisdiction. If a statutory requirement does *not* employ such language, it is presumptively not jurisdictional. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 468 (2007); *Arbaugh*, 546 U.S. at 515-16. That inference is especially strong where Congress has already provided a general grant of jurisdiction over the type of claim (here, in 28 U.S.C. § 1338), and the condition at issue is contained in an unrelated provision (here, in § 411(a)) that neither expressly restricts

jurisdiction nor refers at all to the general grant. When Congress decides to withdraw jurisdiction, it does not do so by winks and nods.

Even without the presumption that § 411(a) is nonjurisdictional, there is powerful evidence for that conclusion in the specific language of § 411(a) and surrounding provisions. Section 411(a) addresses the obligations of litigants rather than the authority or power of courts, a factor this Court has found persuasive in statutory construction. Other sections of the Copyright Act that cross-reference § 411(a) refer to it exclusively as a mere “requirement,” even as they refer elsewhere to the “jurisdiction” of the district court. *Compare* 17 U.S.C. § 501(b), *with id.* § 502(a). And the statute creates exceptions to the register-before-instituting-suit requirement for non-U.S. works and works for which registration is denied, exceptions that are difficult to justify if § 411(a) implicates the authority of a court to adjudicate copyright infringement actions. In fact, registration or its practical equivalent has been a requirement in every copyright act passed for more than 200 years, but none of those acts ever called it jurisdictional. The development of jurisdictional and register-before-suit requirements on different tracks, as well as judicial treatment of registration under early copyright acts, strongly militates against any jurisdictional characterization now.

The Second Circuit disregarded the recent teachings of this Court because it felt constrained to follow its own precedents and like rulings from other circuits that characterized § 411(a) as jurisdictional. In each of those cases, any conclusion about jurisdiction was made in passing language, and any dismissal was

functionally indistinguishable from a decision denying the infringement claim on the merits. None of those courts analyzed the language and structure of the Copyright Act in the way this Court has made clear is necessary.

The Second Circuit also drew erroneous distinctions between § 411(a) and statutes held to enact mandatory but nonjurisdictional requirements. The court thought that § 411(a) must be jurisdictional because it imposed a “condition precedent” to suit. But conditions precedent have repeatedly been held to be non-jurisdictional. *See, e.g., Zipes v. TWA, Inc.*, 455 U.S. 385, 394 (1982); *Sims v. Apfel*, 530 U.S. 103, 106 n.1 (2000). Congress’s decision to phrase the registration requirement as a condition before a suit may be brought does not indicate that it intended it to limit the authority of the *court* to hear that suit.

Finally, in vacating the industry-wide settlement agreement that took the parties four years to negotiate, the decision below ignored the language of § 411(a) and legions of decisions holding that courts may both release claims that they lack jurisdiction to adjudicate and approve settlement agreements providing relief that they could not grant. Approval of the settlement agreement here was not an adjudication beyond the district court’s subject matter jurisdiction, but merely the ratification of a private agreement between the parties in a case in which jurisdiction is undisputed. Jurisdiction under 28 U.S.C. § 1338 over the § 411(a)-compliant complaint armed the district court with the power to approve the settlement agreement presented to it, even though it could not have adjudicated claims for unregistered works over the defendants’ objection.

ARGUMENT**I. THE TEXT, STRUCTURE, HISTORY, AND PURPOSE OF § 411(a) MAKE CLEAR THAT ITS REGISTRATION REQUIREMENT IS MANDATORY BUT NOT JURISDICTIONAL.**

As this Court has repeatedly noted, courts addressing statutory threshold conditions for asserting a cause of action have sometimes profligately characterized such conditions as “jurisdictional” as if that term were synonymous with “mandatory” or “important.” See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citing 2 J. Moore, *Moore’s Federal Practice* § 12.30[1], at 12-36.1 (3d ed. 2005)). But it is error to conflate those two categories. Jurisdictional requirements speak to the power of the court to decide a case. See *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Henderson v. United States*, 517 U.S. 654, 672 (1996) (defining jurisdiction as the power “to adjudicate the type of controversy involved in the action”); see also *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 2009 U.S. LEXIS 3304, at *3307 (May 4, 2009) (“defining jurisdiction as the extent to which a court can rule on the conduct of persons or the status of things”). By contrast, mandatory requirements, whether framed as elements, preconditions to a cause of action, or claim-processing rules, focus on what a plaintiff must show to commence or prevail in a case already within the court’s jurisdiction. *Arbaugh*, 546 U.S. at 510-16; *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Decisions have occasionally attached the label “jurisdictional” to ordinary statutory requirements without grappling with the question of whether those requirements were actually meant to limit the court’s authority to decide a claim. This Court has

described such decisions as “drive-by jurisdictional rulings” that are entitled to “no precedential effect” on that issue. *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co.*, 523 U.S. at 91).

Classification of a statutory requirement as jurisdictional – as opposed to a mandatory precondition or element or claim-processing rule – is ultimately a matter of legislative intent. *See generally Palmore v. United States*, 411 U.S. 389, 400-01 (1973). In a series of recent opinions, this Court has conducted close statutory examinations to determine whether particular provisions alleged to be jurisdictional are truly so. Among other factors, the Court has considered whether the requirement “speaks in jurisdictional terms” or refers to the jurisdiction of the federal courts, *Arbaugh*, 546 U.S. at 515 (noting that the 15-employee threshold for Title VII claims “appears in a separate provision that ‘does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts’”) (quoting *Zipes*, 455 U.S. at 394); whether legislative history reveals a congressional purpose to make the requirement jurisdictional, *Rockwell*, 549 U.S. at 468 (noting that a statute whose purpose was to establish the elements of an offense was not jurisdictional “merely because [it] was phrased as providing for ‘jurisdiction’ over such suits”), *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (holding that a statute whose purpose was to regulate “proceedings auxiliary to cases already within th[e] court’s adjudicatory authority” was not jurisdictional), *Zipes*, 455 U.S. at 394-95 (holding that a statute whose purpose was to provide an extended “time limitation so as to give the aggrieved person the maximum benefit of the law” was not jurisdictional); whether the

requirement is contained in a provision separate and apart from a more general grant of jurisdiction, *Arbaugh*, 546 U.S. at 515, *Hallstrom*, 493 U.S. at 31, *Zipes*, 455 U.S. at 394-95; and whether the statutory purpose underlying the requirement requires that it be deemed unwaivable and made subject to mandatory *sua sponte* review by the district courts – elements traditionally associated with jurisdictional provisions. *Arbaugh*, 546 U.S. at 515.⁶

The rule that has emerged is that statutory requirements that are not expressed in jurisdictional terms are not jurisdictional. This case fits comfortably within that rule. The Second Circuit erred because it felt bound by its own precedents – precedents that typify the “drive-by jurisdictional rulings” criticized by

⁶ While jurisdictional measures are inflexible and necessarily subject to *sua sponte* policing by courts, mandatory (but nonjurisdictional) provisions are also inflexible, and may be subject to policing by the district court or to only limited waiver. *See Day v. McDonough*, 547 U.S. 198 (2006) (courts may police nonjurisdictional filing deadlines that respondents have not raised, or unintelligently waived); *Kontrick v. Ryan*, 540 U.S. 443, 457 n.12 (2004) (suggesting that bankruptcy litigants may not stipulate to the assertion of time-barred claims when those bars are mandatory but not jurisdictional); *Eberhart v. United States*, 546 U.S. 12, 18-19 (2005) (mandatory rules “assure relief to a party properly raising them, but do not compel the same result if the party forfeits them”); *see generally* Scott Dodson, *Mandatory Rules*, 61 *Stan. L. Rev.* 1 (2008); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 *Nw. U. L. Rev. Colloquy* 228 (2008).

this Court – and failed to conduct the searching analysis required by this Court’s recent decisions. Every one of the factors on which this Court has relied as a guide to congressional intent militates in favor of the conclusion that registration is not jurisdictional. Indeed, the register-before-suit “requirement” is so riddled with exceptions and qualifications that it is unlikely that Congress would have deemed it jurisdictional. Further, an unbroken historical chain of copyright legislation shows that registration never was, nor is it now, more than a mandatory threshold requirement to a claim for relief.

A. Under The “Bright Line” Test Of *Arbaugh v. Y & H Corp.*, The Registration Requirement Is Not Jurisdictional Because Congress Did Not Call It Jurisdictional.

Four Terms ago, this Court unanimously announced a “readily administrable bright line” test for determining whether a federal statute will be considered jurisdictional. *See Arbaugh*, 546 U.S. at 515. If Congress clearly states that a threshold limitation on the scope of a particular statutory provision is jurisdictional, then it should be treated as jurisdictional. On the other hand, when Congress does not rank a statutory limitation on coverage as jurisdictional, “courts should treat the restriction as nonjurisdictional in character.” *Id.* at 516. The merit of this test, the Court stated, is that it provides litigants and lower courts with a straightforward method for categorizing provisions as jurisdictional or merely as mandatory threshold requirements for a claim. *Id.*; *see Rockwell*, 549 U.S. at 468 (when a requirement is jurisdictional, the statutory text should be “clear *ex visceribus verborum*”).

In *Arbaugh*, the Court considered whether a provision of Title VII defining a covered employer as a person engaged in commerce who has fifteen or more employees was a jurisdictional prerequisite. In doing so, the Court carefully reviewed the text, structure, and history of the provision in question and Title VII's own jurisdiction-conferring provision. The Court observed that the numerosity requirement did not appear in the federal question jurisdictional statute, 28 U.S.C. § 1331, nor in Title VII's jurisdictional provision, but rather in a separate provision that “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Arbaugh*, 546 U.S. at 515 (quoting *Zipes*, 455 U.S. at 394). Because Congress did not state clearly that the numerosity requirement was meant to be jurisdictional, the Court held it could be only an element of the plaintiff's cause of action.

Under the *Arbaugh* test, the registration requirement of § 411(a) plainly does not qualify as jurisdictional. The provision in the first sentence of § 411(a) for registering before suit does not use the word “jurisdiction,” nor does it refer to the power of the court or employ any other term traditionally associated with jurisdiction. Remarkably, the majority below did not even cite *Arbaugh* although it had been decided only the previous year. Under *Arbaugh*, the absence of such language in the registration provision establishes definitively that it does not restrict jurisdiction.

The presence of the word “jurisdiction” in the last sentence of § 411(a) does not alter this conclusion. The second and third sentences were inserted to reverse the rule of *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958)

(L. Hand, J.), in which the Second Circuit held under the 1909 Act that, in situations where the Register refused to issue a registration certificate, a plaintiff could not bring an infringement action until he or she first filed and won a separate action for mandamus against the Register, since the district court had no power to hale the Register into the infringement action and compel him or her to act on the application to register. Because Congress considered the requirement of two suits in two different courts inefficient and unduly burdensome, it added the final sentences of § 411(a) specifically to overrule *Vacheron* when it passed the 1976 Act. See 1961 Register’s Report Sec. B(1)(e); H.R. Rep. No. 94-1476, at 157 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.⁷ The text of the third sentence –

⁷ The House Report accompanying the 1976 Act states:

The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before suit can be brought against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; the Register would be a party on the issue of registrability only, and a failure by the Register to join the action would “not deprive the court of jurisdiction to determine *that issue*.”

H.R. Rep. No. 94-1476, at 157 (emphasis added).

supplemented by the careful legislative explanation – makes plain that the reference to “jurisdiction to determine that issue” refers to the issue of registrability. Nothing in the legislative solution to the *Vacheron* problem, which allowed the infringement suit to proceed and the registrability issue to be resolved even if registration were denied and the Register declined to appear, suggests that the register-before-suit requirement restricts subject matter jurisdiction. Indeed, Congress’s addition of the last two sentences of § 411(a) demonstrates its ability to address issues of jurisdiction clearly when it seeks to do so.

Despite the bright-line rule laid down in *Arbaugh*, the majority below reasoned that § 411(a) is not a “claim-processing rule” like Federal Rule of Criminal Procedure 33 and therefore it must be jurisdictional. Pet. App. 17a (citing *Eberhart*, 546 U.S. 12 (per curiam)). That is a false dichotomy, as *Arbaugh* itself teaches. The numerosity requirement of Title VII is also not phrased as a claim-processing rule, and yet *Arbaugh* held that it was not jurisdictional either. 546 U.S. at 516. There is no rule that statutory provisions must be one or the other. *Arbaugh* and *Zipes* make plain that threshold conditions are not jurisdictional unless Congress says they are.

The majority below also believed that § 411(a) must be jurisdictional because it creates a “statutory condition precedent to the suit itself.” Pet. App. 17a. That argument is wrong as well. This Court has recognized mandatory prerequisites to suit that are nonjurisdictional. *See, e.g., Zipes*, 455 U.S. at 392-98 (holding that mandatory requirement that Title VII plaintiff file EEOC charge before instituting suit does

not restrict jurisdiction). Indeed, in the case of one statutory prerequisite that this Court held mandatory, it did not even deem it necessary to *reach* the question whether it also was jurisdictional. *See Hallstrom*, 493 U.S. at 30 (requirement that citizen must notify the EPA 60 days before bringing action under the Resource Conservation and Recovery Act).

Contrary to the view of the majority, *see* Pet. App. 18a, nothing in *Bowles v. Russell*, 551 U.S. 205 (2007), suggests otherwise. *Bowles* concerned the time limits for filing a notice of appeal in a civil case set forth in 28 U.S.C. § 2107. In holding those time limits to be jurisdictional, this Court relied explicitly and heavily on the fact that such deadlines had been “treated as jurisdictional in American law for well over a century” *Id.* at 209 n.2. The Court pointedly distinguished *Arbaugh* on the grounds that the threshold requirement at issue there was not a time limit. *Id.* at 211. Like the employee-numerosity requirement in *Arbaugh*, of course, the copyright registration requirement of § 411(a) contains no such time limit.⁸

There is no basis, therefore, to exclude § 411(a) from *Arbaugh*’s core holding. Congress could easily have phrased the registration requirement in jurisdictional terms or otherwise clearly stated that it was a

⁸ Similarly, in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753-54 (2008), the Court relied on more than 100 years of precedent and *stare decisis* to hold that the statute of limitations governing the Court of Federal Claims is not waivable. Unlike in *Arbaugh*, and here, the statute there expressly tied the filing time limit to the jurisdiction of the Court of Federal Claims. *See id.* at 753 (citing 28 U.S.C. § 2501).

jurisdictional requirement. Its failure to do so demonstrates that it intended § 411(a) to be only an element of, or mandatory precondition to, the filing of a copyright infringement claim.

B. According To The Statutory Indicia Recognized By This Court, Registration Is Not Jurisdictional.

1. *Statutory Text and Structure.* The structure of the Copyright Act and the specific language of § 411(a) provide potent evidence that Congress did not intend the registration requirement to be jurisdictional. The general grant of jurisdiction over copyright cases is contained in 28 U.S.C. §§ 1331 and 1338(a), the latter broadly providing original jurisdiction over “any civil action arising under any Act of Congress relating to . . . copyrights.” Neither section makes any reference to a registration condition. Symmetrically, the register-before-suit condition in § 411(a) makes no reference to subject matter jurisdiction. The complete disjunction between these two sets of provisions strongly indicates that § 411(a) is a threshold requirement of an infringement action, not a withdrawal of jurisdiction. *See Arbaugh*, 546 U.S. at 515 (noting that the 15-employee threshold of Title VII “appears in a separate provision” from both § 1331 and Title VII’s jurisdictional provision); *Verizon Md. Inc. v. PSC of Md.*, 535 U.S. 635, 644 (2002) (“[N]othing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies.”); *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825 (1990) (finding jurisdiction based on the “plain text” of a statutory provision that “affirmatively describes the jurisdiction

of the federal courts” and the absence of any limiting language in that provision).

Zipes is illustrative. There, in holding that a Title VII plaintiff’s EEOC filing requirement was not jurisdictional, this Court relied in large part on the fact that the provision granting district courts jurisdiction under Title VII, 42 U.S.C. § 2000e-5(f)(3), is “entirely separate” from and “contains no reference to” the timely-filing requirement, which appeared in 42 U.S.C. § 2000e-5(e). *Id.* at 393-94 & nn.9-10. The latter provision, in turn, “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Id.* at 394. The Court found this significant even though other subsections of § 2000e-5(f) – specifically, subsections § 2000e-5(f)(1) and (2) – also refer to various other aspects of filing EEOC charges. As compared to the proximity between § 2000e-5(f)(3) and § 2000e-5(e), the distance between Title 28 and Title 17 in the United States Code is worlds apart.

When Congress has wanted to restrict grants of jurisdiction contained in Title 28, it has done so expressly. For example, 42 U.S.C. § 405(h) specifically bars the exercise of jurisdiction under 28 U.S.C. §§ 1331 and 1346 over certain claims under the Social Security Act.⁹ Some sixty federal statutes withdraw in specified

⁹ “No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 . . . to recover on any claim arising under this title” 42 U.S.C. § 405(h) (emphasis omitted). When it passed the Copyright Act of 1976, Congress was likely mindful of that provision, as this Court addressed it a year earlier in the highly publicized *Weinberger v. Salfi* decision.
(cont’d)

instances the exercise of federal jurisdiction that would otherwise exist under § 1331 or other jurisdictional grants. All of them identify particular matters over which courts will not have jurisdiction.¹⁰

Section 411(a) looks nothing like any of those statutes. Section 411(a) is patterned not on carve-outs from jurisdictional grants or provisions denying jurisdiction over specified matters, but on statutes specifying limitations periods and exhaustion requirements.¹¹ Such statutes have repeatedly been held *not* jurisdictional absent special language or circumstances. *Day v. McDonough*, 547 U.S. 198, 205

(cont'd)

422 U.S. 749 (1975). Another example in which Congress expressly limited § 1331 jurisdiction is found in 49 U.S.C. § 10709(c)(2), covering transportation contacts (“This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28 . . .”).

¹⁰ A representative list of these statutes is set out in Addendum A to this brief.

¹¹ *See, e.g.*, 19 U.S.C. § 1621 (“Limitation of Actions. *No suit or action* to recover any duty under section 592(d), 593A(d), or any pecuniary penalty or forfeiture of property accruing under the customs laws *shall be instituted* unless such suit or action is commenced within five years after the time when the alleged offense was discovered . . .”) (emphasis added); 43 U.S.C. § 902 (“*no suit or action shall be brought* to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior . . .”) (emphasis added); *see also* 15 U.S.C. § 78i(e) (“*No action shall be maintained* to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.”) (emphasis added); 28 U.S.C. § 1350 note (“*No action shall be maintained* under this section unless it is commenced within 10 years after the cause of action arose.”) (emphasis added).

(2006) (“A statute of limitations defense . . . is not ‘jurisdictional,’ hence courts are under no obligation to raise the time bar *sua sponte*.”); *Kontrick*, 540 U.S. at 458.

The plaintiffs’ infringement actions were each a “civil action arising under any Act of Congress relating” to copyrights. *See Arbaugh*, 546 U.S. at 516. Section 1338 therefore provided jurisdiction over those actions. It is irrelevant to that jurisdiction that, if the case had not been settled, § 411(a) would have precluded the plaintiffs from litigating any infringement claims for unregistered works. “Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought.” *The Fair v. Kohler Die & Specialty*, 228 U.S. 22, 25 (1913); *see Steel Co.*, 523 U.S. at 90-93 (rejecting the argument that the elements of a cause of action must be met in order for jurisdiction to attach); *Lauritzen v. Larsen*, 345 U.S. 571, 574-75 (1953).

Moreover, and tellingly, Congress bundled § 411(a) together with the other two contemporaneous provisions that aim at inducing registration, §§ 410(c) and 412 (discussed at note 17, *infra*, and accompanying text), in Chapter 4 of the 1976 Act (Copyright Notice, Deposit, and Registration). Those two other provisions have not been held and cannot be fairly read to restrict jurisdiction, and their companion should be interpreted in that light.

The statutory text of § 411(a) and related provisions reinforce what the structure shows. That text weighs heavily against any conclusion that Congress intended registration to be jurisdictional, for three reasons.

First, the statutory directive of § 411(a) speaks to the obligations of litigants, not the powers of courts. The provision prescribes the steps that a copyright holder must take before an action for infringement can be “instituted,” not limitations on whether a district court can hear the

case. *See also* § 411(b)(3) (referring to registration before suit as an “obligation[] or requirement[]” of the copyright owner). Statutes that speak “to the rights or obligations of the parties” rather than “to the power of the court” are not jurisdictional. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994).

Second, the very terms of the registration requirement codified in § 411(a) undercut the notion that the authority of the court is at issue. Under § 411(a), non-U.S. works (generally, works first published abroad) do not need to be registered before an infringement suit may be instituted. Even with regard to U.S. works, a denial of registration suffices, under the second sentence of § 411(a), and § 411 contains other exceptions to the requirement as well. *See* pages 11-12, *supra*. As the dissent below noted, the fact that § 411(a) is “riddled with jurisdictionally recognized exceptions,” Pet. App. 35a, makes it highly unlikely that it was intended to be jurisdictional.

Third, the Copyright Act itself distinguishes registration from jurisdictional provisions. Whereas § 502(a) of the Act provides that “[a]ny court having *jurisdiction* of a civil action arising under this title” may grant injunctive relief, its immediate neighbor, § 501(b), provides that the owner of copyright “is entitled, subject to the *requirements* of § 411, to institute an action” for infringement. 17 U.S.C. §§ 501(b), 502(a) (emphasis added). The reference to jurisdiction in § 502(a), but only to registration in § 501(b), suggests that Congress considered them two different subjects altogether.

2. *Legislative History*. The 1976 Copyright Act generated an unusually extensive and lengthy legislative history extending over nearly twenty years. In that entire mass of documentation and reports, there does not appear

to be a single reference to registration as a jurisdictional requirement.¹² If registration were truly jurisdictional, one would have expected the legislative history of this exhaustively studied statute to say so loud and clear.

¹² The sole exception is contained in Professor Benjamin Kaplan's scholarly study prepared for the Register, which mentioned the district court's initial decision in *Washington Publ'g Co. v. Pearson*, 306 U.S. 30 (1939), dismissing the action on jurisdictional grounds, which it later repudiated on reconsideration, as discussed below at note 15, *infra*. See Benjamin Kaplan, The Registration of Copyright, Study No. 17, in Copyright Law Revision Studies Nos. 17-19, prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 86th Cong., 2d Sess., at 21 (Comm. Print 1960). Professor Kaplan, a noted scholar of copyright and civil procedure, evidently considered the district court's decision on reconsideration correct, *id.* at 21-22, and never again in his study referred to a registration precondition as jurisdictional. Neither did Professor Ralph Brown or any of the other experienced copyright practitioners and academics who read and commented on the Kaplan study. See *id.* at 74 (comments of Professor Brown referring only to "registration as a condition precedent to litigation"); *id.* at 71-73 & 75-80 (comments of others). Nor was "jurisdiction" used in relation to registration-before-suit in the closely related Copyright Revision Study No. 18 regarding the Register's authority to reject registration applications. See Caruthers Berger, Authority of the Register of Copyrights to Reject Applications for Registration, Study No. 18, *id.* at 81-105. Indeed, in the official comprehensive index to all 34 Copyright Revision Studies, the word "jurisdiction" is cited only once and never in connection with registration before instituting suit. See Copyright Law Revision, Subject Index to Studies 1-34, at 18 (Senate Committee on the Judiciary, US GPO 1961); see also Benjamin Kaplan, An Unhurried View of Copyright, 26, 38, 79, 82-83 (1967) (describing the new registration proposal as a "formality," an "inducement," and "a condition of an infringement action," but never referring to it as a restriction of jurisdiction).

The clearest evidence that the framers of the 1976 Act did *not* intend registration to be a jurisdictional requirement is contained in the influential 1961 Report of the Register of Copyrights, one of a series of reports that reviewed the existing provisions of the 1909 Act and suggested changes. In a section entitled “provisions regarding judicial procedures,” the Report stated:

The Copyright Act of 1909 contained several sections dealing with the jurisdiction, venue, and procedures of the courts in copyright cases. In 1948 some of these provisions were repealed since they were covered in the Judicial Code (title 28, United States Code) and in the Federal Rules of Civil Procedure. The three remaining sections, 112-114, concern injunctions and appellate review.

1961 Register’s Report, at 135. Significantly, the registration-before-suit provision of the 1909 Act, § 12, was neither repealed in 1948 nor preserved in the three “remaining” sections. Hence, it follows that § 12 was *not* viewed as dealing with jurisdiction, venue, or the procedures of the courts.

The other reports and studies that make up the legislative history of the 1976 Act invariably lacked any reference to jurisdiction in describing the registration-before-suit provision, and never suggested that compliance with the registration requirement qualified the jurisdictional grant in 28 U.S.C. § 1338. They characterized registration as a “prerequisite to an action” or as a condition to suit. *See, e.g.*, H.R. Rep. No. 94-1476, at 150, 157; S. Rep. No. 94-473, at 139, 160 (1976); Kaplan, *supra*, at 64 (identifying various “major issues,” none of which suggests that registration had been or should be jurisdictional).

For example, the 1976 House Report, on which this Court has repeatedly relied,¹³ says that “copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement,” and that “section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted.” H.R. Rep. No. 94-1476, at 157. Those characterizations carry no jurisdictional flavor. Having decided that “[c]opyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory,” Congress enacted §§ 410, 411(a) and 412 to “induce[]” registration “in some practical way.” *Id.* at 158. Again, there was no suggestion that any of those three provisions was intended to restrict the jurisdiction afforded by §§ 1331 and 1338. *Id.* at 158; S. Rep. No. 94-473, at 139-40.

In the years just prior to and after copyright revision, the standard treatise and the leading casebook on copyright both treated registration as mandatory but without any reference to it being jurisdictional. *See* Melville B. Nimmer, Nimmer on Copyright § 92.1 (1976), at 346 (referring to registration and deposit as “conditions precedent to the right to maintain a copyright action,” failure of which is “clearly fatal to plaintiff’s claim”). Neither the Treatise nor the two decisions it cited for that proposition characterized the register-before-suit requirement as jurisdictional. Similarly, the 1979 edition of the leading copyright textbook of the era called registration “generally a prerequisite to suit” without any suggestion that the provision is jurisdictional. Alan Latman, *The Copyright Law: Howell’s Copyright Law Revised and the 1976 Act* (5th ed. 1979), at 157.

¹³ *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003); *Tasini*, 533 U.S. at 493; *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994).

The enactments that followed passage of the 1976 Copyright Act also lack any indication that registration should be treated as jurisdictional. For example, the House Report that accompanied implementation of the Berne Treaty lacked any reference to any jurisdictional character of § 411(a). H.R. Rep. No. 100-609 at 43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706. When that statute authorized authors of non-U.S. works to sue without registration, the legislative history indicated that it was done for substantive reasons of copyright policy, not based on an evaluation of which matters are appropriate for federal courts to consider, as would typically underlie decisions to grant or deny subject matter jurisdiction over classes of cases. *See* S. Rep. No. 100-352 at 17-25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706; 134 CONG. REC. S14554 (daily ed. Sept. 26, 1988) (Joint Explanatory Statement on Amendment to S.1301).

Similarly, the legislative history of the House of Representatives' failed effort in 1993 to repeal the register-before-suit provision of § 411(a) does not discuss any jurisdictional implications of the proposed repeal. *See, e.g.*, 139 CONG. REC. E 337 (Extension of Remarks, Feb. 16, 1993) (introducing Statement of Rep. Hughes). Finally, the Visual Artists Rights Acts of 1990 (which exempted suits based on moral rights violations from registration requirements), the Family Entertainment and Copyright Act of 2005 (which allowed suits for non-registered works to proceed if they were "pre-registered"), and the PRO-IP Act (which exempted criminal proceedings from registration requirements) all created exceptions to 411(a) without any references to jurisdiction. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008). Nor do the reports from the pertinent House and

Senate Committees direct courts to treat § 411(a) as a restriction on subject matter jurisdiction. *See* H.R. Rep. No. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915; H.R. Rep. No. 110-617 (2008); H.R. Rep. No. 109-33 (2005), *reprinted in* 2005 U.S.C.C.A.N. 220; H.R. Rep. No. 108-700 (2004).¹⁴

However, when Congress did choose to speak about jurisdiction over copyright claims, it did so explicitly, clearly, and reflecting the view that only Title 28 governed that jurisdiction. In the House Report on the Semiconductor Chip Protection Act of 1984, Pub. L. 980620, 98 Stat. 3347, the Judiciary Committee noted:

Section 910(b) [now essentially in 17 U.S.C. § 910(b)(1)] permits the owner of the rights in a registered mask work to institute a civil action for infringement, similar to a copyright infringement action. *The jurisdictional and other provisions of the Judicial Code (e.g., 28 U.S.C. § 1338) that apply to copyrights* are intended to apply also to mask work rights.

H.R. Rep. No. 98-781, 98th Cong., 2d Sess., May 15, 1984, at 27 (emphasis added, footnote omitted). If Congress thought that § 910(b), which parallels § 411(a), was also a jurisdictional provision, it surely would have said so.

¹⁴ There was a passing comment in a House report to H.R. 4279 (2007) that referred to the “jurisdictional and remedial provisions of sections 411 and 412.” *See* H.R. Rep. No. 110-617 (2008), at 39. The report did not clarify the sense in which either section was “jurisdictional,” nor explain whether it used that term precisely or in the loose fashion reflected in the lower courts’ recent case law. In any event, the House bill that the report accompanied was not enacted into law. The Senate passed a distinct bill, S. 3325, lacking any accompanying report, that was enacted into the PRO-IP Act.

3. *Prior Copyright Laws.* Although registration has been an important feature of copyright law since the dawn of the Republic, *see* Act of May 31, 1790, 1 Stat. 124, §§ 2-3, there is virtually no evidence that it was ever considered a jurisdictional requirement. In 1790, the copyright holder was required to register a work before obtaining “the benefit of” the copyright law, *id.*, but legislative and judicial authorities have always described registration as a part of substantive copyright law.

To begin with, Congress has consistently separated successive versions of the registration requirement from grants of subject matter jurisdiction. As the chart appended as Addendum B demonstrates, dating back to the Judiciary Act of 1789, the predecessors of § 1338 have proceeded on a separate track from legislation requiring registration, in two lines of laws enacted at different times. Moreover, since 1948, when the jurisdictional provisions of the copyright act were repealed, the copyright code has contained no jurisdictional provisions for infringement claims. The jurisdictional provision in Title 28 have not referred to the registration prerequisites in Title 17, nor vice-versa. If Congress had ever considered registration to be jurisdictional, it would likely have addressed or referenced that requirement when it revised or codified the jurisdictional statutes.

The separation of jurisdictional enactments from statutory registration prerequisites has been embodied in practical form since 1938 in the model Complaint for Copyright Infringement that this Court has promulgated as an appendix to the Federal Rules of Civil Procedure. *See generally* Form 17, 19 Charles E. Hughes, *Federal Practice, Jurisdiction & Procedure* 248-

49 (1940); Form 19, 12A Charles A. Wright & Arthur R. Miller et al., *Federal Practice & Procedure*, App'x D, at 579-80 (2008). Since then – and thus under both the 1909 Act and the 1976 Act – the model jurisdictional allegations have referred not to any registration precondition, but only to the jurisdictional grants of Title 28.

The model copyright infringement complaint was originally promulgated as Form 17 in 1938 when the federal rules were first established, and renumbered as Form 19 in 2007.¹⁵ From 1939 until 2007, Form 17 directed copyright infringement claimants to include in ¶ 1 an “allegation of jurisdiction” (without any reference to registration or other copyright formalities); in ¶¶ 2 and 3, allegations specifying the work infringed and ownership of copyright therein; and in ¶ 4, an allegation of compliance with statutory preconditions including registration (without any reference to jurisdiction or cross-reference to ¶ 1). The updated 2007 form requires a “statement” rather than an “allegation” of jurisdiction, but again it merely directs attention to the general jurisdictional template, and does not link registration to jurisdiction. Evidently, these have always been treated as two separate topics.

Judicial constructions of early copyright acts did not characterize registration as jurisdictional. For example, in this Court’s first encounter with the registration requirement, the Court was presented with the

¹⁵ In all respects material to the present issue, the model complaint is unchanged from 1938, and indeed was wholly unchanged from 1938 until minor revisions and renumbering in 2007. *See, e.g.*, Minutes of the Civil Rules Advisory Committee, Apr. 19-20 (1999).

argument that the complainant was not entitled to proceed with an infringement action because he had not complied with the deposit provisions of the 1790 Act and with the provision of the 1802 Act making deposit a precondition “to the benefit of the act . . .” *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 662-665 (1834). Citing English cases construing similar legislation, the Court concluded that the formalities required were necessary to “the recovery of the penalties provided in the act against those who pirated the work.” But far from treating compliance as jurisdictional – a threshold matter for the circuit court to decide – the Court remanded the case with directions to that court to order an issue of facts to be examined and tried by a jury. *Id.* at 668. Factual disputes entrusted to juries are substantive; if the matter went to the jury, jurisdiction was necessarily present. *Arbaugh*, 546 U.S. at 514.

Similarly, in *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 41 (1939), which concerned § 12 of the 1909 Copyright Act, the direct predecessor of § 411(a), although the district court initially characterized the register-before-suit requirement as jurisdictional, it reversed itself on reconsideration,¹⁶ and none of the subsequent opinions on appeal in the D.C. Circuit and this Court renewed that characterization. Section 12 provided in relevant part that “[n]o action or proceeding

¹⁶ See *Washingtonian Publ’g Co. v. Pearson*, Transcript of Record, No. 222 (October Term 1938), at 25 (district court memorandum decision) (“It would seem that the jurisdiction of this court to enforce plaintiff’s rights is conferred solely by plaintiff’s full compliance with such conditions and formalities.”); see also *id.* at 26-27 (reversing that conclusion upon reconsideration). See Kaplan, Study No. 17, *supra*, at 21.

shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.” *Id.* at 38. The defendant argued, and the Court of Appeals held, that the quoted language doomed the publisher’s infringement claim because, not having made a prompt deposit, it had indisputably not complied with the statute.

This Court reversed, holding that failure of compliance with § 12 should be sanctioned in less “drastic” ways, and that Congress had not specified dismissal as an appropriate penalty. As the Court explained:

Plausible arguments in support of [dismissal] were advanced by the Court of Appeals. We think, however, its adoption would not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences. We cannot accept it.

Id. at 39.

Far from holding the last sentence of § 12 jurisdictional, the Court held that respecting Congress’s work required choosing a construction that provided “adequate” compulsion over one that would have “a more drastic effect [that] would tend to defeat the broad purpose of the enactment.” *Id.* Since § 12 yoked deposit and registration together, *Pearson*’s treatment of § 12 is highly instructive, and difficult if not impossible to square with characterizing § 12 as jurisdictional. *Pearson* was fully in accord with the text and legislative history of the 1909 Act, which reflects the understanding

that registration was a mandatory but not jurisdictional condition to the institution of a suit.¹⁷

The treatment of the register-before-suit provision as mandatory without any suggestion that it might be jurisdictional was not unique to *Pearson*. Notably, in the one decision addressing registration under the 1909 Act that the Congress enacting the 1976 Act surely carefully considered, *see* H.R. Rep. No. 94-1476 at 157, the Second Circuit enforced the register-before-suit requirement without any reference to it being jurisdictional. *See Vacheron*, 260 F.2d at 639-41, discussed at pages 19-21, *supra*.

4. *Purpose*. Like exhaustion requirements, which impose a condition precedent to suit but are not jurisdictional unless Congress so provides, and like the 15-employee hurdle imposed by Title VII as well, § 411(a) serves instrumental purposes that do not implicate the authority or institutional competence of the district court.

¹⁷ *See* H.R. Rep. No. 7083, 59th Cong., 2d Sess., at 8 (1907) (register-before-suit provision was “[f]or the protection of the public”); *see also* S. Rep. No. 6187, 59th Cong., 2d Sess., at 5 (1907) (“Deposit and registration will still be compulsory; . . . [no] suit for infringement [can] be brought until they are made.”). Notably, in pre-1909 Act decisions cited in *Pearson*, English courts explicitly referred to registration as “a condition precedent” to perfecting an infringement claim, and not as a limitation on jurisdiction. *See Pearson*, 306 U.S. at 36 n.2 & 42 (citing *Goubaud v. Wallace* (1877), 36 Law Times (N. S.) 704, 705; *Cate v. Devon & Exeter Constitutional Newspaper Co.* (1889), 60 L. T. 672, 5 T. L. R. 229). The 1909 Congress presumably knew of these decisions—and the 1976 Congress certainly was charged with knowledge of this Court’s discussion of them when it crafted § 411(a).

The 1976 Act made registration voluntary, and the register-before-suit provision was one of three provisions of the 1976 Act which aimed at inducing registration “in some practical way.”¹⁸ Registration, in turn, serves three core functions: it creates a useful public record for copyright owners and the using public;¹⁹ helps to induce deposits, and thereby to build the Library of Congress’s collections;²⁰ and “simplif[ies] and expedite[s] litigation.”²¹

Those instrumental purposes fully warrant treating § 411(a)’s registration precondition as mandatory and strictly enforceable at the front end of litigation (when claims are “institute[d]”). But they do not compel the conclusion that Congress wanted the registration precondition to be jurisdictional as well. The purpose of § 411(a) identified by Congress – to interact with §§ 410 and 412 to induce registration, *which the 1976 Act expressly made optional*, and which is even so riddled

¹⁸ See H.R. Rep. No. 94-1476, at 158. The other two inducements were the availability of prima facie proof of the factual assertions in a registration, if obtained within five years of publication (§ 410(c)), and the availability of enhanced damages and attorneys fees (§ 412). See *id.*; see also S. Rep. No. 94-473, at 140; H.R. Rep. 100-609, at 41; S. Rep. No. 100-352, at 19.

¹⁹ “Registration as a prerequisite to suit helps to ensure the existence of a central, public record of copyright claims. This publicly available depository of information is of benefit to both copyright owners and users.” H.R. Rep. No. 100-609, at 42.

²⁰ H.R. Rep. No. 100-609, at 42 (“Registration is an important source of acquisitions for the Library of Congress.”); S. Rep. No. 100-352, at 22.

²¹ S. Rep. No. 100-352, at 23-24 (brackets in original).

with exceptions²² – lacks the quality of relentless, unexceptioned mandatoriness that characterizes jurisdictional provisions. The purpose underlying § 411(a) in no way suggests that Congress intended § 411(a) to restrict jurisdiction, or to play a role in the allocation of legal claims among the nation’s various courts. *See, e.g., Hallstrom*, 493 U.S. at 31 (concluding that Congress did not clearly intend a notice precondition to be jurisdictional, where “the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits”); *Arbaugh*, 546 U.S. at 514-16 (noting, in finding Title VII’s employee-numerosity requirement to be mandatory but not jurisdictional, Congress’s strong desire and intention to provide a federal forum for the adjudication of employment-discrimination claims); *Zipes*, 455 U.S. at 394 (characterizing as mandatory but not jurisdictional a provision that furthered legislative policies but was not labeled as jurisdictional by Congress).

Under the approach of *Pearson*, enforcing § 411(a) as “mandatory” for the initiation of claims to be adjudicated but not restrictive of settlements better fits the overall legislative purposes than treating it as jurisdictional, which would threaten important copyright law values such as providing effective injunctive relief against serial infringers and allowing private parties to arrange their affairs most efficiently and clarify their rights outside of court. The latter goal is of particular import in a case like this, involving a long,

²² The exceptions are addressed at pages 11-12, *supra*.

painstaking, and extensively negotiated settlement agreement addressing a large number of low-value works as to which registration is uneconomical and thus highly impractical, and without which hundreds of thousands of works will be permanently depleted from the nation's electronic databases and archives. Interpreting § 411(a)'s registration requirement to frustrate such arrangements would directly undercut the congressional purposes animating that section and the Copyright Act in general and threaten a great "waste of judicial resources" and private ones as well. *Arbaugh*, 546 U.S. at 515.

C. The Circuit Court Decisions Referring To § 411(a)'s Registration Requirement As "Jurisdictional" Have Not Been Predicated On The Careful Analysis Mandated By This Court In *Arbaugh*.

The Second Circuit relied principally on what it termed "widespread agreement" among the circuits that § 411(a) is jurisdictional. Pet. App. 12a-14a. But in every case it cited, the characterization of § 411(a) as "jurisdictional" rested not on any analysis of the kind employed in *Arbaugh* and *Zipes*, but only on rote invocation of the label "jurisdictional" to mean "mandatory," "important," or "enforceable." Such decisions amount to nothing but "drive-by jurisdictional rulings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), where courts simply assigned the jurisdictional tag to § 411(a) without due consideration of the contours of the statute and legislative intent – a mistake then carelessly repeated across the circuits. One treatise was correct in calling the decision below "[t]he most extensive look at the jurisdictional nature of

section 411(a)” to date, *see* 5 William F. Patry, Patry on Copyright § 17:78 (2007), but in truth the Second Circuit’s analysis resembles Gertrude Stein’s Oakland: There’s no there there.

In *Morris v. Bus. Concepts, Inc.*, 259 F.3d 65, 68 (2d Cir. 2001), *amended by* 283 F.3d 502 (2d Cir. 2002) – one of the precedents the majority relied upon – the Second Circuit held that a claim for the infringement of an individual article would not lie where the freelance author alleged infringement of her individual article, but the only registration was obtained by the publisher of the magazine for its collective work, and not by the freelance author for her contribution. Although the court referred to registration as a jurisdictional requirement, it affirmed the grant of the defendant’s timely motion to dismiss for the plaintiff’s failure to comply with § 411(a), and the same result would have been reached had § 411(a) been called “mandatory” instead of “jurisdictional.”²³

Similarly, in *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 354 F.3d 112 (2d Cir. 2003), the Second Circuit affirmed the district court’s decision for the defendant after a bench trial, agreeing that the defendant’s work did not infringe the plaintiff’s smaller doll (in which copyright was registered) but at most only its larger version, claimed to be a derivative work (in which copyright was not registered). While the court noted in dicta that it lacked “subject matter jurisdiction” to consider whether the defendant had infringed the copyright on the unregistered derivative work, the

²³ The affirmance of summary judgment is telling, since if § 411(a) deprived the district court of subject matter jurisdiction the claim should have been dismissed (and the dismissal affirmed) under Rule 12(b)(1) or 12(h)(3), not Rule 56.

holdings of both the district court and the Court of Appeals were on the merits – no infringement of a registered work – and would have been the same had the provision been considered mandatory but not jurisdictional.

The six cases from other circuits that the Second Circuit cited in the instant case are each to the same effect. In some of these cases, the court simply made a fleeting mention of the issue of jurisdiction without ever holding that the district court lacked subject matter jurisdiction. *See, e.g., Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283 (4th Cir. 2003); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1163 (1st Cir. 1994). In the other decisions, the courts engaged in none of the analysis of jurisdictional versus mandatory requirements that *Arbaugh* requires, and the characterization of § 411(a) as “jurisdictional” was superfluous since the dispositions would have been the same had the requirement been treated as mandatory. *See, e.g., Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365-66 (5th Cir. 2004); *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200 (10th Cir. 2005); *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 632 (6th Cir. 2001); *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1285-86 (11th Cir. 2000).

Had these courts hewed to *Arbaugh*’s directive to use the “jurisdictional” label only sparingly, after considered analysis, they would have followed the approach of the Seventh Circuit, which has seen no need to pin a “jurisdictional” label on § 411(a)’s registration requirement, implicitly (and correctly) recognizing that it does not limit the power of the federal courts.

See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (Posner, J.) (holding that “an application to register must be filed, and either granted or refused, before [a copyright] suit can be brought,” without any reference to § 411(a) as jurisdictional); *Pickett v. Prince*, 207 F.3d 402, 404 (7th Cir. 2000) (Posner, J.) (characterizing registration as “a precondition to a suit for copyright infringement” without reference to § 411(a) as jurisdictional); see also *Brooks-Ngwenya v. Indianapolis Pub. Schools*, 2009 U.S. App. LEXIS 8126, at *9 (7th Cir. Apr. 15, 2009) (per curiam) (holding that the notification provision of § 411(a) is mandatory but not jurisdictional).

A review of cases in which a court characterized § 411(a) as jurisdictional reveals only two decisions where the disposition actually turned on whether the requirement was jurisdictional, as distinct from merely mandatory. See *Weitzman v. Microcomputer Res., Inc.*, 542 F.3d 859, 863 (11th Cir. 2008) (holding that because lack of registration was a jurisdictional defect, a declaratory judgment suit seeking to establish no infringement would not lie in federal court and required remand for dismissal); *Techniques, Inc. v. Rohn*, 592 F. Supp. 1195, 1198 (S.D.N.Y. 1984) (remanding removed case to state court where the plaintiff did not allege proper registration and had no other bases for federal jurisdiction). Neither the text of § 411(a) nor its legislative history suggests that Congress intended the requirement of registration to be jurisdictional so as to obtain these results. See Points I.A. and I.B., *supra*. Moreover, treating § 411(a) as jurisdictional, as *Weitzman* did, leads to an unpalatable result Congress could never have intended, depriving users of copyrighted works of the benefits of declaratory

judgment actions by enabling copyright owners to block any suit for declaratory relief – for example, by historians or literary critics threatened with an infringement suit for quoting from unpublished letters – by refusing to register the works at issue.

In cases like this, classifying § 411(a) as mandatory but not jurisdictional would preserve judicial power to approve a settlement agreement compensating authors for claims concerning unregistered works by permitting defendants to waive its application at settlement. And as the Second Circuit recognized, deeming § 411(a) jurisdictional threatens the power of courts to grant otherwise appropriate injunctive relief in properly instituted cases. *Compare, e.g., Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345 (8th Cir. 1994); *A&M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368 (7th Cir. 1988); *Nat’l Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726 (8th Cir. 1986); *and Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984) (all affirming the grant of otherwise appropriate injunctive relief extending beyond registered works), *with* Pet. App. 15a-16a (casting doubt on power to do so). *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* ¶ 7.16[C][3] (2008) (in a case instituted in compliance with § 411(a), a court “may order remedies such as seizure or injunction as permitted by statute, without reference to whether the precise items seized or enjoined are covered by a registration certificate”); 2 Paul Goldstein, *Goldstein on Copyright* § 11.2.1.2 (2002).

II. EVEN IF § 411(a) RESTRICTS SUBJECT MATTER JURISDICTION, THAT RESTRICTION APPLIES ONLY TO INSTITUTING ACTIONS, NOT SETTLING THEM.

Even if § 411(a) restricts jurisdiction in some regard, it does not follow that every action carried out by a court that concerns an unregistered work lies beyond its authority. Here, it is undisputed that the district court had original jurisdiction over the plaintiffs' actions when they were instituted in 2000, because each plaintiff alleged that he or she had registered the work in question. That jurisdiction did not evaporate merely because, five years later, the parties reached an agreement that would settle a larger class of claims. By its terms, and consistent with long-established authority, § 411(a) does not purport to limit the district court's authority to approve a settlement agreement that releases claims concerning unregistered works. Thus, even if § 411(a) were held to withdraw some measure of subject matter jurisdiction, the Second Circuit still erred in concluding that the settlement agreement could not be approved.

A. The Statutory Text Focuses On “Institut[ing]” Actions, Not Settling Them.

Section 411(a) directs claimants not to “institute” any “action for infringement of the copyright in any United States work . . . until . . . registration of the copyright claim has been made in accordance with” the Copyright Act. Filing a complaint, not certifying a class for settlement, is the “institution” of a lawsuit. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 (1983). There is particularly good reason to attend to the statutory verb here, because Congress used it three

times to describe the types of actions for which registration was a precondition. *See* 17 U.S.C. §§ 411(a), 501(b), and former § 205(d), repealed by the Berne Convention Implementation Act of 1988.²⁴ Indeed, after the Register completed his long and careful study underlying copyright revision, the new law replaced the 1909 Act’s “no action . . . shall be maintained” without registration with “no action . . . shall be *instituted*.” Applying § 411(a) far beyond what the text warrants – as a limitation not only on the institution of suit and presentation of claims for adjudication but also on the permissible scope of settlement – conflicts with the caution that “[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants.” *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 558 (2005) (proper focus in subject matter jurisdictional inquiry is whether “the action is one in which the district courts would have original jurisdiction,” not whether each putative class member could herself have been a plaintiff at the time of class certification).

Similarly, courts have consistently construed the plain language of § 411(a), which is focused on the institution of claims for adjudication, as not barring otherwise appropriate injunctive relief regarding future or unregistered works, in cases instituted in compliance with § 411(a). *See* the authorities cited at page 44, *supra*.

The plaintiffs complied with § 411(a) when they filed their infringement actions. Every named plaintiff who was required to register a work did so before filing the

²⁴ Former § 205(d) expressly required recordation of a copyright transferee’s chain of title as a “prerequisite to [an] infringement suit.” No appellate court ever held it jurisdictional.

action. While the plaintiffs alleged class claims as well, those claims were never litigated, much less adjudicated.²⁵ Indeed, the court had no involvement in those claims whatsoever until five years later, when the plaintiffs moved to approve the settlement agreement whereby the defendants agreed to provide relief to the proposed class in exchange for broad releases.

Section 411(a) directs attention to the “institution” of infringement actions. Fairly read in light of its purpose, it necessarily (to avoid end runs) prohibits the presentation of claims for the adjudication of infringement of unregistered works, whether at the initiation of the case or later, such as by amendment. But nothing in the statutory language suggests that Congress meant to strip a court of jurisdiction to settle a properly instituted case in which the court never exercised power to adjudicate a claim or to grant copyright remedies for an unregistered work. Treating § 411(a) as doing so is inconsistent with the rule that congressionally granted subject matter jurisdiction generally depends on the circumstances at filing and not on post-filing developments. *See, e.g., Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 2009 U.S. LEXIS 3304, at *10 (May 4, 2009); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004).

²⁵ The presence of those class claims in the complaints does not mean that the district court lacked original jurisdiction. The class claims lay dormant until the plaintiffs sought to certify the class for settlement. Indeed, the plaintiffs could have taken that latter step even if they had never mentioned the class in their complaints at the outset.

B. As A General Rule, Jurisdiction Over An Action Extends To Approving Settlements That Release Claims the Court Lacked Authority To Try.

This construction of § 411(a) is reinforced by the general rule that courts may approve settlements that release claims they could not have tried for want of jurisdiction. As this Court has held, when a party seeks to settle a case, the settlement agreement may encompass additional parties, claims, or modes of relief beyond those to which the district court's original authority extended. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 29 (1998) (holding that transferee courts lack jurisdiction to try transferred cases, but noting no objection to a transferee court's settlement of a case it lacked power to try); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374-75 (1996) (giving full faith and credit to settlement in state court that released claims subject to exclusive federal jurisdiction).²⁶ As one leading commentator has explained, this line of cases demonstrates that through the "alchemy of settlement,"

²⁶ *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108-09 (2d Cir. 2005) (court had jurisdiction to approve settlement benefiting persons who asserted no claims and were thereby outside court's jurisdiction); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (courts without jurisdiction to try claims may have jurisdiction to release them); *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994) (same); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (same); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33-34 (1st Cir. 1991) (same); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (same).

a court can dispose of claims it could not adjudicate. Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 598, 628 (2005).

The distinction between jurisdiction to adjudicate and ancillary settlement authority was decisive in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522-23 (1986). Even though Congress denied the district court power to grant certain relief, this Court held that the district court nonetheless had inherent Article III power to approve a consent decree providing relief that it could not itself have awarded. Doing so violated no statute because it was the parties' agreement, not the court's adjudication, that produced the agreed-upon terms. *Id.*; *see also id.* at 526 ("the court is not barred from entering a consent decree merely because it might lack authority . . . to do so after a trial"); *Scarborough*, 541 U.S. at 413 (issue concerning judicial power in connection with attorneys fees did "not concern the federal courts' 'subject-matter jurisdiction' . . . [but] a mode of relief . . . ancillary to the judgment of a court that has plenary 'jurisdiction'" of the civil action in the first place). That principle applies with full force here.

In the case of class actions in particular, because of the strong public policy favoring "comprehensive settlement," courts have the power to approve settlements releasing claims that they had no jurisdiction to adjudicate. *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). *Matsushita* and the cases that precede and follow it consider the power of courts to approve settlements "broadly [under] the law of 'releases' rather than narrowly [as an] issue of

federal court jurisdiction.” *Williams v. GE Capital Auto Lease*, 159 F.3d 266, 268-69, 273-74 (7th Cir. 1998) (treating members of a settlement class as beneficiaries of the parties’ settlement agreement, rather than as parties themselves).

Nor did the Second Circuit’s reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Califano v. Yamaski*, 424 U.S. 682 (1979) (Pet. App. 20a-24a), justify ignoring *Matsushita* and *Firefighters* on the theory that each claim within a class must satisfy every jurisdictional requirement. Those decisions rested on the text of 42 U.S.C. § 405(g) and (h) and the special concerns implicated in suits against the government. Absent those factors, the rule is otherwise. This Court in *Exxon*, 545 U.S. at 548, made plain that there is no constitutionally compelled general rule that a class may not include members who have standing but could not themselves be named plaintiffs. Unsurprisingly, *Zipes* expressly held that the district court, which granted injunctive relief extending beyond the named plaintiffs to class members who had not filed with the EEOC, “did have jurisdiction over nonfiling class members.” 455 U.S. at 399. See also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976) (reversing refusal to adjudicate claims of and denial of relief to Title VII class members who had not themselves filed EEOC charges); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (same).

The case for treating a restriction on jurisdiction as not precluding settlement power over a properly instituted action within the court’s existing jurisdiction is considerably stronger here than in usual cases under

the *Matsushita* line. Here, Congress has granted, not forbidden, federal jurisdiction over copyright cases – indeed, it has done so since 1789, and expressly since 1819. See Point I.B, *supra*. By contrast, the state court in *Matsushita* could *never* have adjudicated the federal securities act cases, and yet this Court granted full faith and credit to its resolution of those federal claims by approving a settlement agreement containing broad releases over which it lacked any jurisdiction. *A fortiori*, upholding settlement power here does not disrespect the precondition to suit Congress imposed.

This Court decided seventy years ago that registration-before-suit should have a practical, not an overly strict or formalistic, construction. *Pearson*, 306 U.S. at 41. *Pearson*'s holding that respecting Congress's work required choosing a construction that provided "adequate" compulsion over one that would have "a more drastic effect [that] would tend to defeat the broad purpose of the enactment," *id.*, should be followed here. The Second Circuit's result does not square with the words of the statute; it conflicts with the authorial rights and interests at stake, whose vindication this Court sought to permit in *Tasini*; and it has unfortunate consequences for freelance authors, publishers, and overstretched federal courts.

CONCLUSION

For all the foregoing reasons, the judgment below should be vacated and the case remanded for further consideration of the objectors' appeal from the district court's final judgment approving the settlement agreement.

Respectfully submitted,

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APPENDIX

Addendum A
Statutes Expressly Limiting the
Jurisdiction of Federal Courts

Title 2: Congress

**Congressional mailing standards, 2 U.S.C. § 501(e),
502(c)**

Notwithstanding any other provision of law,
no court or administrative body in the United
States or in any territory thereof shall have
jurisdiction to entertain any civil action of any
character concerning or related to a violation
of the franking laws

Title 7: Agriculture

Stay of proceedings and exclusive jurisdiction
(Agricultural Adjustment Act of 1938), 7 U.S.C. § 1367

No court of the United States or of any State
shall have jurisdiction to pass upon the legal
validity of any such determination except in a
proceeding under this Part.

Title 8: Aliens and Nationality

Authority to apply for asylum, 8 U.S.C. § 1158(a)(3)

Limitation on judicial review. No court shall
have jurisdiction to review any determination
of the Attorney General under paragraph (2).

Addendum A

Admission qualifications for aliens (aliens previously removed), 8 U.S.C. § 1182(a)(9)(B)(v)

No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Admission qualifications for aliens (waiver for marijuana possession), 8 U.S.C. § 1182(h)

No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Admission qualifications for aliens (immigrant inadmissible for fraud or willful misrepresentation of material fact), 8 U.S.C. § 1182(i)(2)

No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Visa waiver program for certain visitors, 8 U.S.C. § 1187(c)(6)

No court shall have jurisdiction under this paragraph to review any visa refusal, the denial of admission to the United States of any alien by the Attorney General, the Secretary's computation of the visa refusal rate, or the designation or nondesignation of any country.

Addendum A

Visa application sole method to dispute denial of waiver, 8 U.S.C. § 1187(g)

There shall be no other means of administrative or judicial review of such a denial, and no court or person otherwise shall have jurisdiction to consider any claim attacking the validity of such a denial.

Deportable aliens (waiver for document fraud), 8 U.S.C. § 1227(a)(3)(C)(ii)

No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

Voluntary departure, 8 U.S.C. § 1229c(f)

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure

Judicial review of orders of removal, 8 U.S.C. § 1252(a)(2)(A)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such, no court shall have jurisdiction to review

Addendum A

**Judicial review of orders of removal, 8 U.S.C.
§§ 1252(a)(2)(B), (a)(2)(C), (b)(9), (g)**

Notwithstanding any other provision of law . . . no court shall have jurisdiction to review any final order of removal

**Adjustment of status (judicial review), 8 U.S.C.
§ 1255a(f)(4)(C)**

Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section

Title 12: Banks and Banking

Regulation of holding companies (cease and desist orders), 12 U.S.C. § 1467a(g)(5)(B)

Except as provided in subsection (j), no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

**Termination of insured credit union status, 12 U.S.C.
§ 1786(k)(1)**

However, except as otherwise provided in this section or section 216, no court shall have jurisdiction to affect by injunction or

Addendum A

otherwise the issuance or enforcement of any notice or order under this section or section 216 or to review, modify, suspend, terminate, or set aside any such notice or order.

Payment of insurance (powers and duties of National Credit Union Administration Board as conservator or liquidating agent), 12 U.S.C. § 1787(b)(13)(D)

Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over

Termination of status as insured depository institution, 12 U.S.C. § 1818(i)(1)

. . . except as otherwise provided in this section or under section 38 or 39, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Insurance Funds (powers and duties of FDIC as conservator or receiver), 12 U.S.C. § 1821(d)(13)(D)

Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over

Addendum A

Federal Reserve Board termination of activities or ownership or control of nonbank subsidiaries constituting serious risk (administration), 12 U.S.C. § 1844(e)(2)

. . . . except as provided in section 9 of this Act, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Farm Credit Administration, 12 U.S.C. § 2267

Jurisdiction and enforcement except as otherwise provided in this part . . . no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this part

Actions against persons committing bank fraud crimes/declarations providing new claims to the United States (nonreviewability of action by the Attorney General), 12 U.S.C. § 4208

Notwithstanding any other law, no court shall have jurisdiction over any claim based on any action taken by the Attorney General or any refusal to take action under this chapter, except for failure to provide notification under section 2566.

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Actions against persons committing bank fraud crimes (declarations providing United States with new information concerning recovery of assets), 12 U.S.C. § 4228

Notwithstanding any other law, no court shall have jurisdiction over any claim based on any action taken by the Attorney General or any refusal to take action under this chapter

Proceedings based on private declarations against persons committing bank fraud crimes (Declarant's notification to Attorney General to pursue action through private contractor), 12 U.S.C. § 4242

Notwithstanding any other law, no court shall have jurisdiction over any claim based on the Attorney General's decision to refuse to enter into a contract

Supervision and regulation (government-sponsored enterprises), 12 U.S.C. § 4584(b)

Limitation on jurisdiction. Except as otherwise provided in this subpart, no court shall have jurisdiction to affect

Addendum A

Judicial review of director action (government-sponsored enterprises), 12 U.S.C. § 4623(d)

Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subtitle.

Enforcement and jurisdiction of any effective and outstanding notice or order (government-sponsored enterprises), 12 U.S.C. § 4635(b)

Except as otherwise provided in this subtitle and sections 1369 and 1369D, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order under section

Title 15: Commerce and Trade

Emergency conversion of utilities and other facilities (natural gas), 15 U.S.C. § 717z(g)(1)

Except as provided in paragraph (2), no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued under this section unless such relief is in connection with a final judgment entered with respect to such order.

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Alaska natural gas transportation (actions of federal officers or agencies), 15 U.S.C. § 719h(c)

Jurisdiction. . . . no other court . . . shall have jurisdiction of any such claim in any proceeding instituted prior to or on or after the date of enactment of this Act

Automotive propulsion research & development (program provisions and requirements), 15 U.S.C. § 2703(f)(3)

. . . . no court shall have any jurisdiction to review the preparation or adequacy of such certifications

Retail policies for natural gas utilities, 15 U.S.C. § 3207(a)(1)

(a) Limitation of Federal jurisdiction
(1) Notwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of this title . . . except for

Natural gas policy administration (enforcement and review), 15 U.S.C. § 3416(c)

Judicial review of emergency orders Prior to a final judgment, no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order

Addendum A

Duties of Secretary of Energy (methane transportation research, development, and administration), 15 U.S.C. § 3803(d)(3)

. . . no court shall have any jurisdiction to review the preparation or adequacy of such certifications

Title 16: Conservation

Power regulation of electric utility companies (orders requiring interconnection or wheeling), 16 U.S.C. § 824k(f)(3)

Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission

Public utility regulatory policies (judicial review and enforcement), 16 U.S.C. § 2633(a)

(a) Limitation of Federal jurisdiction. Notwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subtitle A or B or of this subtitle except

Addendum A

Alaska national interest lands conservation (transportation), 16 U.S.C. § 3168

No court shall have jurisdiction to grant any injunctive relief lasting longer than ninety days against any action pursuant to this except

Title 19: Customs Duties

Review of countervailing duty/antidumping duty determinations involving free trade area country merchandise (NAFTA bi-national panel review), 19 U.S.C. § 1516a(g)(2)(B)

. . . no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise.

Liquidation of entries (NAFTA bi-national panel review), 19 U.S.C. § 1516a(g)(5)(C)(iv)

. . . no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

Addendum A

Implementation of international obligations under article 1904 of the NAFTA or the Agreement (NAFTA bi-national panel review), 19 U.S.C. § 1516a(g)(7)(A)

Any action taken by the administering authority or the Commission under this paragraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

Disclosure of proprietary information under protective orders issued pursuant to NAFTA or the United States-Canada Agreement, 19 U.S.C. § 1677f(f)(1)(C)

A decision concerning the disclosure or nondisclosure of material under protective order . . . shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such decision

Addendum A

Title 22: Foreign Relations and Intercourse
Targeted responses to violations of religious freedoms abroad (preclusion of judicial review),
22 U.S.C. § 6450

No court shall have jurisdiction to review any Presidential determination or agency action under this Act or any amendment made by this Act.

Title 25: Indians
Mohican Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775h(b)

. . . no court shall have jurisdiction over any action to contest the constitutionality of this Act or the validity of any agreement entered into under the authority of this Act or approved by this Act, unless such action was filed prior to the date of termination of the period specified in subsection (a).

Title 26: Internal Revenue Code
Review of assessments and collections, 26 U.S.C. § 6305(b)

No court of the United States, whether established under article I or article III of the Constitution, shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary

Addendum A

Review of reductions, 26 U.S.C. § 6402(g)

No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by

Title 29: Labor

Issuance of restraining orders and injunctions, 29 U.S.C. § 101

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act

Enumeration of specific acts not subject to restraining orders or injunctions, 29 U.S.C. § 104

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute

Addendum A

Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies, 29 U.S.C. § 105

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground

Issuance of injunctions in labor disputes, 29 U.S.C. § 107

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after

Relief from certain existing claims under the Fair Labor Standards Act of 1938, 29 U.S.C. § 252(d)

No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act [enacted May 14, 1947], to enforce

Addendum A

Title 31: Money and Finance

Civil actions for false claims, 31 U.S.C. § 3730(e)(1),
31 U.S.C. § 3730(e)(2)(A), and 31 U.S.C. § 3730(e)(4)(A),

No court shall have jurisdiction over an action

. . . .

Title 42: Public Health and Welfare

**Determination of eligibility and benefits (smallpox
emergency personnel protection)**, 42 U.S.C.
§ 239a(f)(2)

Judicial and administrative review. No court of the United States, or of any State, District, territory or possession thereof, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this section.

Evidence and procedure for establishment of benefits (Social Security Act), 42 U.S.C. § 405(h)

No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28, United States Code, to recover on any claim arising under this title

Addendum A

**Enforcement proceedings (voting rights), 42 U.S.C.
§ 1973l(b)**

Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction. No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to . . . this title.

Review of Nuclear Proliferation Assessment Statements, 42 U.S.C. § 2160a

No court or regulatory body shall have any jurisdiction under any law to compel the performance of or to review the adequacy of the performance of any Nuclear Proliferation Assessment Statement

**Patents and inventions (atomic energy), 42 U.S.C.
§ 2184**

No court shall have jurisdiction or power to stay, restrain, or otherwise enjoin the use of any invention or discovery by a patent licensee

Addendum A

Hazardous substances releases, liability, compensation, 42 U.S.C. § 9622(e)(3)(C)

[N]o court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. . . .

Title 43: Public Lands

Crude oil transportation systems (judicial review), 43 U.S.C. § 2011(c)

Notwithstanding the amount in controversy, such court shall have jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided and to provide appropriate relief.

Title 49: Transportation

Contracts, 49 U.S.C. § 10709(c)(2)

This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28

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Addendum A

Title 50: War and National Defense

Information rewards (atomic weapons and special nuclear materials), 50 U.S.C. § 47d(b)

A determination made by the Attorney General under section 3 of this Act shall be final and conclusive and no court shall have power or jurisdiction to review it.

Addendum B
Separate Lineage of Statutes Requiring
Registration and Granting Jurisdiction

Predecessors of
17 U.S.C. § 411(a)

Predecessors of
28 U.S.C. § 1338

1790 Act
(1 Stat. 124)

§ 2: “[I]f any other person or persons, *from and after the recording the title* of any map, chart, book or books . . . shall print [that work without the author’s consent, they are subject to suit by the author in an] action of debt in any court of record in the United States, wherein the same is cognizable.”

§ 3: “[N]o person shall be entitled to the benefit of this act . . . unless he shall before publication deposit a printed copy of the title in the clerk’s office of the district court. . . .”

1789 Judiciary Act
(1 Stat. 73)

§ 11: “*Circuit courts shall have original cognizance*, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**1802 Amendment
(2 Stat. 171)**

§§ 1-2: [Refers to 1790 title deposit provision as one of the “requisites” of the Copyright Act.]

§ 3: “[I]f any print-seller . . . shall engrave [a protected work] without the consent of the proprietor . . . [he] shall forfeit one dollar for every print . . . to be recovered in any court having competent jurisdiction thereof.”



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**Predecessors of
28 U.S.C. § 1338, cont.**

**1831 Act
(4 Stat. 36)**

§ 4: “No person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book. . . .”

§ 6: “That if any other person or persons, *from and after the recording the title* of any book... [shall print that book without the copyright owner’s consent, they can be sued] by action of debt in any court having competent jurisdiction thereof.”

**1819 Act to Extend
the Jurisdiction of the
Circuit Courts
(3 Stat. 481)**

“[C]ircuit courts of the United States shall have original cognisance, as well in equity as at law of all actions of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries.”



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**1870 Act
(16 Stat. 212)**

§ 90: “[N]o person shall be entitled to a copyright unless he shall, before publication, deposit in the mail a printed copy of the title of the book . . .”

§ 99: “[I]f any person, *after the recording of the title* of any book . . . [shall print that book without the copyright proprietor’s consent, he can be sued] in a civil action by such proprietor in any court of competent jurisdiction.”



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**1873 Act Incorporating
Copyright Law into
Title 60 of the Revised
Statutes
(18 Stat. 957, 958-59)**

§ 4956: “No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress or deposit in the mail . . . a printed copy of the title of the book. . . .”

§ 4964: “Every person who, *after the recording of the title* of any book . . . and without the consent of the proprietor of the copyright . . . [shall] sell or expose to sale any copy of such book . . . [shall] pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.”



**Predecessors of
28 U.S.C. § 1338, cont.**

**1873 Act Relating to
Jurisdiction and
Procedures of the
United States Courts
in Cases Arising
under Patent and
Copyright Laws -
Title 13 of the Revised
Statutes
(18 Stat. 109, 110, 134)**

§ 629: “[C]ircuit courts shall have original jurisdiction as follows: Ninth. Of all suits at law or in equity arising under the patent or copyright laws.”

§ 711: “The jurisdiction vested in the courts of the United States in cases and proceedings herein-after mentioned shall be exclusive of the courts of the several states Fifth. Of all cases arising under the patent-right or copyright laws of the United States.”



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**1909 Act
(35 Stat. 1075)**

§ 12: “No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and *registration of such work shall have been complied with.*” (Codified as 17 U.S.C. § 12).



**Predecessors of
28 U.S.C. § 1338, cont.**



**Judicial Code of 1911
(36 Stat. 1087)**

§ 24: “*The district courts shall have original jurisdiction as follows: . . . Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.*” (Codified as 28 U.S.C. § 41).

§ 256: “The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States . . . Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.” (Codified as 28 U.S.C. § 371).



Addendum B

**Predecessors of
17 U.S.C. § 411(a), cont.**

**1947 Act to Codify and
Enact 1909 Copyright
Act into Positive Law**
(61 Stat. 652)

§ 13: “No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and *registration of such work shall have been complied with.*” (Codified as 17 U.S.C. § 13).



1976 Act
(90 Stat. 2541)

§ 411(a): “No action for infringement of the copyright in any work shall be instituted *until registration of the copyright claim has been made in accordance with this title.* (Codified as 17 U.S.C. § 411(a)).

**Predecessors of
28 U.S.C. § 1338, cont.**



**1948 Revision to
Judicial Code**
(62 Stat. 869)

§ 1338(a): “*The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.*” (Codified as 28 U.S.C. § 1338(a)).