

## **Tasini Update: Supreme Court Holds that Section 411(a) Registration Requirement is not Jurisdictional (2010)**

Earlier this month, the Supreme Court held in *Reed Elsevier, Inc. v. Muchnick*, that the registration requirement in section 411(a) of the Copyright Act is not jurisdictional. In a continuation of the *Tasini* case (involving electronic rights to freelance articles written for newspapers and magazines) the *Reed Elsevier* Court was faced with the question of whether a class settlement involving the electronic rights could contain unpublished as well as published works.

The district court had certified the settlement class (including the unregistered works) and approved the settlement agreement. On appeal, the Second Circuit itself raised the issue of whether section 411(a) deprives federal courts of subject matter jurisdiction over infringement claims involving unregistered works. Concluding that 411(a) was jurisdictional, the appeals court held that the district court lacked the power to both certify the class and approve the settlement.

The Supreme Court then reversed the Second Circuit, reasoning that although the registration requirement is a precondition to filing an infringement action, the failure to register a work does not deprive a federal court of subject matter jurisdiction over cases involving unregistered works. Thus, the district court did have jurisdiction to approve the settlement. The Court also clarified that there are difference between jurisdictional conditions and claim-processing rules, and that courts -- including the Supreme Court -- have used the term "jurisdiction" imprecisely.

### **Jurisdiction versus claim-processing rules**

Jurisdiction refers to the power of a court to hear classes of cases (subject matter jurisdiction) and the persons affected (personal jurisdiction). Claim-processing rules, by contrast, are elements of a claim (for example, exhaustion requirements or time deadlines), which may bar a plaintiff's access to federal court, but do not deprive the court of the authority to hear the claim.

For a condition to be jurisdictional, the *Reed Elsevier* Court explained, Congress's intent must be clearly stated. That is, the provision must be located in the jurisdiction-granting portion of the statute, or based on the specific language and historical treatment of this type of limitation -- the context -- must be "ranked" as jurisdictional.

Fitted into this framework, section 411(a) is not jurisdictional because the Copyright Act does not clearly indicate that registration is jurisdictional. Although the phrase is used in the last sentence of the section (stating that the failure of the Register of Copyrights to become a party to an action where registration has been refused does not deprive the court of jurisdiction to determine the registrability issue), the Court clarified that copyright owners formerly were required to first seek *mandamus* against the Register and that the statute was revised to eliminate this requirement. The reference to jurisdiction,

then, does not address the issue of federal court subject matter jurisdiction to reach claims involving unregistered works.

Moreover, the registration requirement is in a separate section from the provisions granting subject matter jurisdiction over claims. Neither 28 USC 1331 (federal question jurisdiction) nor 28 USC 1338 (specifically providing federal court jurisdiction over copyright claims) conditions either grant upon copyright registration.

Finally, section 411(a) permits federal courts to adjudicate cases involving unregistered works in several circumstances: when a work is not a US origin creation; where the claim relates to rights of attribution and integrity under section 106A, and where registration was attempted but refused. Section 411(c) also permits courts to hear such actions where fixation is simultaneous with transmission and registration is made within 3 months after the first transmission.

The registration requirement, the Court concluded, is thus not jurisdictional, since is it not labeled as such, is not located in a jurisdiction-granting provision, and has numerous congressionally authorized exceptions.

### **Conclusion**

Despite a clear holding that the registration requirement is not jurisdictional, the decision remains opaque. On the one hand, the Court holds that federal district courts have jurisdiction to hear and approve class action settlements involving unregistered works. On the other hand, though, the Court specifically declines to hold that registration is a mandatory precondition to suits that district courts may or should enforce by dismissing copyright infringement claims involving unregistered works.

So who is responsible for raising the registration issue and at what stage of the litigation? And is there a distinction between class actions and individual claims, where in the former the presence of registered works in the class is enough to support the action, while in the latter, unregistered works are eliminated by claimants or judges?