1 IN THE SUPREME COURT OF THE UNITED STATES

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3 REED ELSEVIER, INC., ET AL. :

4 Petitioners :

5 v. : No. 08-103

6 IRVIN MUCHNICK, ET AL. :

7 - x

8 Washington, D.C.

9 Wednesday, October 7, 2009

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:07 a.m.

14 APPEARANCES:

15 CHARLES S. SIMS, ESQ., New York, N.Y.; on behalf of

16 the Petitioners.

17 GINGER ANDERS, ESQ., Assistant to the Solicitor General,

18 Department of Justice, Washington, D.C.; on behalf of

19 the United States, as amicus curiae, supporting the

20 Petitioners.

21 DEBORAH JONES MERRITT, ESQ., Columbus, Ohio; as amicus

22 curiae in support of the judgement below. Appointed

23 by this Court.

24

25

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument next in Case 08-103, Elsevier v. Muchnick.

5 Mr. Sims.

6 ORAL ARGUMENT OF CHARLES S. SIMS

7 ON BEHALF OF THE PETITIONERS

8 MR. SIMS: Mr. Chief Justice, and may it

9 please the Court:

10 The Second Circuit's decision vacating for

11 lack of jurisdiction a settlement agreement that

12 compensated authors for all their arguably infringed

13 works in the face of Congress's direction that Federal

14 district courts shall have jurisdiction over any civil

15 action arising under copyright is wrong for three

16 reasons. First, even -- first, the decision is

17 incorrect under the unanimous holding three years ago in

18 Arbaugh that where Congress affords unqualified subject

19 matter jurisdiction, other statutory provisions argued

20 to be jurisdictional that do not clearly restrict that

21 jurisdiction won't be deemed to do so.

22 CHIEF JUSTICE ROBERTS: This is a lot harder

23 case than Arbaugh, though. Arbaugh involved the

24 definition of an employer and then the scope of the

25 statute. This one says no suit shall be instituted.

1 MR. SIMS: Well, Arbaugh relied heavily on
2 the Zipes case, and the Zipes involved a statutory
3 threshold condition much like the one here. You
4 couldn't bring a Title VII action unless you filed a
5 particular kind of piece of paper with the EEOC. And
6 Zipes and Arbaugh both held that those statutory
7 conditions or essential ingredients were not
8 jurisdictional, and the Court relied, heavily I think,
9 on the fact that jurisdiction was separately provided
10 for and the provisions at issue weren't.
11 The second point I want to make is that,
12 even putting the clear statement rule of Arbaugh to one
13 side, statutory text, structure, purpose and history all
14 point to classifying 411(a) as mandatory but not
15 jurisdictional.
16 CHIEF JUSTICE ROBERTS: I think you are
17 right that Arbaugh at least set forth a clear statement
18 rule, but I think that's significant only going forward.
19 I don't know that Congress, when it passed this
20 provision, could have been aware of the clear statement
21 rule that Arbaugh articulated.
22 MR. SIMS: Well, the Court did apply --
23 reiterate and apply the Arbaugh rule in the Rockwell
24 case with respect to a provision that had predated
25 Arbaugh, and nothing in Arbaugh said that.

1 But in any event, our second point is that
2 if you look at the traditional indicia of not only text
3 but also structure, history and purpose, this provision
4 should be ranked as mandatory but not jurisdictional.
5 And the third point I want to get to --
6 JUSTICE GINSBURG: Do you agree with the --
7 with the government that it's mandatory for the district
8 court but prohibited to the court of appeals? The
9 government has this hybrid where, because of the public
10 purposes served by registration, not only can but the
11 district court should raise the failure to register on
12 its own, but then the government says once you have a
13 final judgment in district court, it's no longer open
14 for the court of appeals to raise it on its own.
15 Do you agree with that or do you say it's
16 for the defendants to raise, and if they don't raise it,
17 too bad?
18 MR. SIMS: Justice Ginsburg, we certainly
19 agree with the government with respect to the court of
20 appeals. With respect to the district court, on the one
21 hand, my clients don't -- are satisfied with the
22 government's position. On the other hand, as Justice
23 Scalia's decision, I think, in Day v. McDonough pointed
24 out, the traditional default rule really is that
25 defenses are up to defendants to raise.

1 In this particular kind of situation where
2 there is no reason at all, I think, to suspect that
3 defense counsel will not raise 411 whenever -- none of
4 the cases that Ms. Merritt raises for example, involve
5 situations of waiver, where the issues weren't raised
6 until the court of appeals -- I think that the Court can
7 rely, frankly, on defendants and on the ability of
8 district judges to nudge defense counsel when they need
9 nudging.
10 But if the Court felt that the provision was
11 important enough so that it wanted to impose on district
12 courts the obligation of strict policing, I think it
13 could. But as I say, I have been practicing copyright
14 law for 25 years; I've never seen a defendant who either
15 missed a defense or chose not to raise it.
16 The third point I want to raise if there is
17 time is simply that, even if 411(a) were deemed
18 jurisdictional at the outset of the case with respect to
19 its language which talks about instituting, nothing in
20 either its text or purpose suggests that Congress meant
21 to deprive district courts of their usual power to
22 settle cases with respect to approving settlement
23 agreements.
24 In this case, because the plaintiffs
25 complied with 411(a) at the front door by alleging

1 properly that they had complied with the obligation, we
2 think the district court had jurisdiction to send the
3 parties to mediation and then necessarily to approve the
4 agreement they returned with three years later. Now
5 with respect to --
6 JUSTICE SCALIA: Can -- can I ask you, one
7 of the points made by the amicus is that, if I recall it
8 correctly, that what -- what Congress had in mind in
9 phrasing it this way was to enable -- enable the party
10 who had not gone to the Copyright Office to go after
11 dismissal on jurisdictional grounds, and the implication
12 is that if it were not held to be jurisdictional, there
13 would be a merits dismissal because of the failure to
14 have gone to the Copyright Office first. And therefore
15 would not -- the plaintiff would not be able to come
16 back to the court.
17 MR. SIMS: I don't understand the amicus to
18 be making that argument. If Your Honor is referring
19 to --
20 JUSTICE SCALIA: I don't --
21 MR. SIMS: -- the third -- the third
22 sentence of 411(a), I think that's the principal
23 argument she makes as to why this satisfies Arbaugh and
24 we think, quite to the contrary, the third sentence of
25 411(a) --

1 JUSTICE SCALIA: No, I didn't -- I didn't
2 think it related to the third sentence. I -- I thought
3 she said the whole purpose of Congress was to make sure
4 that you'd be able to come back, that your failure to go
5 to the Copyright Office initially would not result in a
6 merits dismissal so that you could not later go back and
7 then rebring the suit. If it was jurisdictional, just a
8 jurisdictional dismissal, the jurisdiction could be
9 cured by going to the Copyright Office and your suit
10 could then proceed.
11 MR. SIMS: Your Honor, I think that the --
12 because of the way 411(a) is phrased, dismissals under
13 411(a), whether we are correct that it's not
14 jurisdictional or whether they are correct that it is, I
15 think ordinarily --
16 JUSTICE SCALIA: You would be --
17 MR. SIMS: -- without prejudice --
18 JUSTICE SCALIA: You'd be able to come back
19 anyway?
20 MR. SIMS: Absolutely.
21 JUSTICE SCALIA: That's what I thought.
22 MR. SIMS: That's the nature of this
23 requirement.
24 JUSTICE SCALIA: That's what I thought you'd
25 say.

1 MR. SIMS: Yeah.

2 JUSTICE SCALIA: Yeah.

3 MR. SIMS: With respect to the Arbaugh --

4 JUSTICE KENNEDY: Would -- if the statute of

5 limitations had run, could you still come back?

6 MR. SIMS: The problem in this case, and

7 really the reason why the settlement agreement has

8 turned out the way it did is there is no effective --

9 JUSTICE KENNEDY: I mean, not -- not

10 necessarily in this case, but in -- but in a typical

11 case.

12 MR. SIMS: There is no effective statute of

13 limitations in these cases, Your Honor.

14 JUSTICE KENNEDY: I said in a typical case.

15 MR. SIMS: Well --

16 JUSTICE KENNEDY: Or is it just --

17 MR. SIMS: In -- in a case where the

18 infringement is the existence of something on the web,

19 then there is no statute of limitations effectively,

20 because the argument would be that the making available

21 is an infringement.

22 We don't think that the last sentence of

23 411(a) satisfies Arbaugh or indeed is -- is any evidence

24 toward this being jurisdictional. The last sentence was

25 inserted, as the history makes perfectly clear, to solve

1 the problem created by the Vacheron decision that the
2 Second Circuit had decided in 1958. And in that case,
3 what justice -- Judge Hand had done, and other courts
4 have done it, too, is to say it is -- district courts
5 cannot review the registrar's action in denying
6 registration, and that has to be done in a separate
7 mandamus action, at that point in Washington, D.C.
8 So the lesson simply is Congress's way of
9 saying very clearly: We want to get rid of that
10 rigamarole and we want to allow all this to be done
11 efficiently. But the statement that this could be done
12 even if the registrant didn't show up is not at all any
13 statement, much less a clear statement, that this was
14 intended to be jurisdictional. Now --
15 JUSTICE GINSBURG: Mr. Sims, it has been
16 pointed out that you have taken inconsistent positions.
17 That is, back in the district court before there was a
18 settlement, you urged before the district court that
19 411(a) was a jurisdictional bar and that that precluded
20 certifying a class that included the non-registered
21 copyright holders. You did make that argument in the
22 district court, and now you are saying -- you are
23 confessing error, that was wrong?
24 MR. SIMS: Your Honor, I don't think it's
25 fair to say that we made that argument. We did -- we

1 did issue, we did say that sentence in one or two
2 places, and the argument --
3 JUSTICE GINSBURG: The argument --
4 MR. SIMS: But I think it's -- I think it's
5 different, because the issue in the district court was
6 the fairness, reasonableness and adequacy of the
7 settlement and there was an attack on the different
8 valuation for unregistered claims. In that context we
9 relied on 411(a). The argument would have been exactly
10 the same had we said, as we should have, that 411(a) is
11 mandatory but not jurisdictional. We were guilty of
12 exactly the loose language that this Court was guilty of
13 in Robinson and Smith, as it pointed out in Eberhart or
14 Kontrick.
15 JUSTICE SCALIA: And -- and --
16 MR. SIMS: But as -- but as the Court
17 decision in that case said, there was no need to
18 overrule Robinson or Smith because really what was going
19 on there was the Court had been saying the rule was
20 mandatory, and the additional language that was
21 jurisdictional was loose language.
22 Our argument never focused on the ranking of
23 411(a). It was always rooted in the existence of the
24 rule which did justify, and on the merits of the appeal
25 back in the Second Circuit we will again argue did

1 justify, a different valuation of the claim.

2 JUSTICE SCALIA: Well, you shouldn't use

3 loose language, especially when it's the same loose

4 language, supposedly, that seems to have been used by

5 all the courts of appeals and all the district courts.

6 MR. SIMS: Not all the courts --

7 JUSTICE SCALIA: For years and years.

8 MR. SIMS: Your Honor, the first court of

9 appeals which said that 411(a) said -- not held -- was

10 jurisdictional was in 1990. That's well after the 1976

11 act, and the original act had been -- I mean, the 1909

12 act, which it was patterned after, had been nearly

13 100 years earlier. There was no court of appeals that

14 ever said that the 1909 act was jurisdictional, and when

15 this Court had that case in the Washingtonian case in

16 the 1930s, there was no reference to it being

17 jurisdictional by either the majority or the dissent.

18 And I think Washingtonian is particularly interesting

19 because there the district court had originally held

20 that it was jurisdictional and then sua sponte recanted

21 a few days later and issued another position. And that

22 is in the record of this Court in Washingtonian and it

23 was pointed out by Professor Ben Kaplan in the report to

24 the register and to Congress in connection with the 1976

25 act.

1 So the issue was raised for people to think
2 about if anybody had. But Congress did not in 1976 or
3 at any time earlier say that this was intended to be
4 jurisdictional or was jurisdictional. So if -- if
5 passing the Arbaugh argument with respect to text,
6 structure, history and purpose -- the structure I think
7 is particularly telling, because in this case the
8 provision of jurisdiction is in Title 28, the provision
9 of registration is in the Copyright Act. They've been
10 separated --
11 JUSTICE GINSBURG: But still it's a statute
12 and didn't this Court say in Bowles that a statutory
13 qualification on the right to sue is generally
14 jurisdictional?
15 MR. SIMS: I don't think the Court said
16 that. I think that the Court said that in Bowles with
17 respect to time limits for appeal. I think Bowles is
18 quite clearly limited to time limits for appeal, and the
19 Court's decision rested on -- heavily on stare decisis.
20 With respect to --
21 JUSTICE GINSBURG: But I thought they made a
22 distinction to distinguish the other cases, the one -- I
23 forgot -- the one involving Criminal Rule 33, on the
24 ground, well, that's a court rule, but when Congress
25 makes the qualification then it's jurisdictional.

1 MR. SIMS: But this doesn't involve a time
2 limit. This involves, as Arbaugh and Zipes did,
3 ingredients of the claim, preconditions to the claim,
4 threshold steps with respect to the claim, and I think
5 there is no reason for the Arbaugh approach not to
6 apply. But in any event the structure is telling here;
7 the language is telling as well.
8 CHIEF JUSTICE ROBERTS: Well, if you are
9 talking about the language, what about John R. Sand &
10 Gravel? That said we held it was jurisdictional when
11 the statute said: "Suits shall be barred." The
12 language here is "No suit shall be instituted." That
13 sounds pretty close.
14 MR. SIMS: I think not, Chief Justice
15 Roberts. The language here has been used in copyright
16 statutes in 1831, as our reply brief points out, and
17 includes the language for statutes of limitation and for
18 copyright notice. And all of those have always been
19 deemed mandatory. None of them has been deemed
20 jurisdictional.
21 Again, Section 507 of the Copyright Act, the
22 statute of limitations provision here, has almost
23 exactly the same language as in 411. John R. Sand I
24 think the Court treated as in Bowles --
25 CHIEF JUSTICE ROBERTS: No, that was -- that

1 was a statute of limitations provision, right? It shall
2 be barred after six years?
3 MR. SIMS: Well, John R. Sand involved a
4 special situation of suits against the government and
5 considerations of sovereign immunity.
6 JUSTICE GINSBURG: I thought the Court said
7 it was mandatory. I don't remember when they used the
8 word "jurisdictional."
9 MR. SIMS: Well, I think John R. Sand held
10 that provision was jurisdictional, but I think the
11 decision went off on -- on stare decisis, and the fact
12 that the Court had, with respect to the Tucker Act and
13 matters of suits against the government, taken a
14 different position.
15 Those, I think, are really the only
16 carve-outs, the statutory time limits for appeal and
17 suits against the government, from the general Arbaugh
18 rule.
19 So here Congress has used this language
20 repeatedly. This Court's own forms for copyright
21 infringement, which were first promulgated in the 1930s,
22 have patterned our argument and are contrary to the
23 amicuses'. They have always treated the registration
24 provision of the model complaint differently from the
25 jurisdictional provisions. Those are in separate

1 sections, not next to each other even.

2 CHIEF JUSTICE ROBERTS: We have forms for

3 copyright infringement actions?

4 MR. SIMS: You do. The Federal Rule --

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Live and learn.

7 MR. SIMS: And because they haven't changed

8 very much in 70 years, you probably haven't spent much

9 time with them.

10 JUSTICE GINSBURG: It'S Form 19.

11 MR. SIMS: Yes. It was originally Form 17.

12 We have gone through the history. But I think there is

13 really only one change and in every respect it is

14 identical to what it was in 1938. And, again, as I say,

15 it separates out the registration provision from the

16 jurisdictional provision.

17 If Congress had wanted to make registration

18 jurisdictional, it would have been extraordinarily easy

19 to do so. All they would have had to add at the

20 beginning of 411(a) is "notwithstanding anything in 1338

21 and 1331."

22 We have -- we have included in our brief as

23 an appendix about 60-odd Federal statutes, which carved

24 out jurisdiction otherwise provided by 1331 or other

25 provisions, and 411(a) looks nothing like them. They

1 all look, roughly, like each other.

2 JUSTICE STEVENS: Can I ask a sort of basic

3 question I never understood about this case. As I

4 understand it, the end-of-the-line concern of the

5 fairness of the settlement, and particularly to people

6 who have copyrights who have never been registered. Am

7 I right, that that's what --

8 MR. SIMS: Well, not -- not quite. There

9 were -- there were ten authors who objected, I mean, as

10 a group, and they wanted more money for unregistered

11 authors. There were, needless to say, tens of thousands

12 of other authors who didn't object, but it is true that

13 the objectors wanted -- thought that they had gotten a

14 bad deal.

15 JUSTICE STEVENS: But those were people who

16 owned some registered copyrights, but had other works

17 that were not -- had no registered copyrights. Is that

18 right?

19 MR. SIMS: I --

20 JUSTICE STEVENS: Were there any of those

21 people who had no -- no copyrights at all?

22 MR. SIMS: Well, they -- I don't know, Your

23 Honor, whether the objectors had any registered works.

24 I know that the named plaintiffs had more unregistered

25 works than registered works.

1 JUSTICE STEVENS: But they had some
2 registered works?
3 MR. SIMS: Yes.
4 JUSTICE STEVENS: You see, one of the -- one
5 of the risks involved here is whether people who had no
6 registered works are being adequately protected by this
7 Class C settlement.
8 MR. SIMS: Yes. This is not a situation --
9 JUSTICE STEVENS: And just to get the
10 question on the table -- I don't want to take up much of
11 your time. I don't understand how it makes any
12 difference whether you say the rule is mandatory or the
13 rule is jurisdictional, in terms of the fairness of the
14 settlement, at the end of the line.
15 MR. SIMS: I don't think that has anything
16 to do with the fairness of the settlement. I think we
17 are here because the Second Circuit blew up the
18 settlement and said we can't settle this case, and the
19 only way it was settleable was to give the publishers
20 and the databases complete peace by clearing all off of
21 this off.
22 And so --
23 JUSTICE GINSBURG: And that -- that,
24 certainly, would be open. If you are correct that the
25 Second Circuit shouldn't have cut this off at the

1 threshold by saying it's jurisdictional, the question of
2 the fairness of the settlement is what you were
3 contending.
4 MR. SIMS: That is correct, Your Honor.
5 I would like to reserve the balance of my
6 time. But the -- the adequacy and fairness of the
7 settlement is back in the Second Circuit on remand.
8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Anders.
10 ORAL ARGUMENT OF GINGER ANDERS
11 ON BEHALF OF THE UNITED STATES
12 AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONERS
14 MS. ANDERS: Mr. Chief Justice, and may it
15 please the Court:
16 Statutory prerequisites to suit like Section
17 411(a) often fall into one of two distinct categories.
18 They are either jurisdictional and therefore unwaivable
19 or they are not jurisdictional and are fully waivable.
20 Section 411(a)'s registration requirement falls in the
21 middle of those two extremes.
22 It is not jurisdictional, but it should not
23 be fully waivable. The provision does not speak to the
24 power of the courts to decide cases and therefore it
25 does not limit the court's jurisdiction to adjudicate

1 infringement suits.

2 But, because of this phrase and mandatory

3 language, the requirement should be strictly enforced

4 whenever the defendant asserts it, and because the

5 requirement serves important public interest that are

6 independent of the concerns of the parties to any

7 individual suit --

8 JUSTICE GINSBURG: So your position is that

9 the district court really should have dismissed this

10 case at the outset?

11 MS. ANDERS: I think that, in the ordinary

12 case, the district court should -- when -- when the

13 defendant waives the requirement, which would be the

14 rare case, when the defendant doesn't assert it. When

15 the defendant waives the requirement, the district court

16 should consider whether accepting that waiver would

17 undermine the public interest behind 411.

18 Now, in this particular case, it may not

19 have been an abuse of discretion for the district court

20 to consider those interests and decide that here it

21 would have been acceptable to accept the defendant's

22 waiver and permit the resolution to go forward because,

23 in this case, the periodicals that -- that are

24 involved -- the works at issue were primarily already in

25 the possession of the Library of Congress, because they

1 had been registered as -- the periodicals themselves had
2 been registered.
3 So the Library's interest is not as strongly
4 implicated here. In addition, this is a case in which
5 there was going to be settlement, so the Court wasn't
6 going to need to adjudicate the copyright claims and
7 therefore the opportunity for the register's views to be
8 taken into account was less important.
9 JUSTICE KENNEDY: Maybe this is the same
10 question. Are you representing the interest of the
11 Library of Congress?
12 MS. ANDERS: Yes, we are representing the
13 interest of the Library of Congress.
14 So I think in this case it may have been
15 appropriate for the district court to conclude that --
16 that it could let someone go forward, notwithstanding
17 the fact that some unregistered copyrights were
18 involved.
19 But after adjudication on the merits, the
20 defendant has waived the requirement, and, having come
21 up, Section 411(a), like any other non-jurisdictional
22 rule, should be subject to the general principle that
23 issues that are not raised below should not be
24 considered for the first time on appeal, absent
25 extraordinary circumstances.

1 JUSTICE GINSBURG: You were candid to say
2 that this is in a hybrid category, that the government
3 was taking an intermediate position. Do you know of any
4 other provision where the district court has an
5 obligation to raise the question on its own motion that
6 is yet not jurisdictional?
7 MS. ANDERS: I believe this Court has
8 recognized that waiver doctrines in general are
9 discretionary, and so, particularly in the area of res
10 judicata, the Court has recognized in the Plaut v.
11 Spendthrift Farm and Arizona v. California that the
12 Court has some discretion to enforce res judicata on its
13 own motion.
14 JUSTICE GINSBURG: Very, very limited. I
15 think Arizona didn't say any time there's -- there's a
16 preclusion plea, the Court can raise it on its own.
17 MS. ANDERS: That's correct. I think also
18 the plain error rule presupposes that there are some
19 errors that the district court has a responsibility to
20 correct on its own, even though neither party has
21 brought the error to its attention. So in other words,
22 the district court has the obligation to issue a legal
23 ruling that neither party has asked for, and I think
24 that kind of regime is appropriate here because the
25 public interest at issue, the Library's interest and the

1 interest in the public record of copyright, those don't
2 depend on the defendant's litigation decisions -- they
3 shouldn't depend on the defendant's particular strategic
4 decisions within a particular case.
5 The Library's interest will always be in
6 having every work registered and the public interest and
7 public record will be the same.
8 CHIEF JUSTICE ROBERTS: Is your discussion
9 of that, including in your response to Justice Ginsburg
10 and in your brief, do you think that that's within the
11 question presented, rephrased?
12 MS. ANDERS: I think it is fairly within the
13 question of whether the rule is jurisdictional or not, I
14 think, is -- also encompasses the question of how the
15 rule should be enforced, assuming that it is
16 non-jurisdictional, of what should happen in this case.
17 So I do think that the -- the
18 characterization of this rule as a mandatory or a
19 waivable rule is -- is within the question presented.
20 So I think that the regime we're proposing best gives
21 effect to the mandatory, but non-jurisdictional language
22 that Congress used in Section 411(a).
23 And it also protects the public interest
24 that the requirement serves, which, again, the
25 compilation of a public record of copyrighted works in

1 the copyright office, which allows a robust licensing
2 system under the Copyright Act.
3 JUSTICE SCALIA: But how -- how would we get
4 to hold what -- what you say is the law? It seems, to
5 me, once we decide it's not jurisdictional and once we
6 agree with you, that it doesn't -- at least in this
7 case -- didn't have to be raised sua sponte by the
8 district court.
9 That's the end of the case, and so why do we
10 have to engage in the further discussion, well,
11 ordinarily, the district court must raise it on its
12 own and -- you know, and, if it doesn't ordinarily --
13 you know, the appellate court should.
14 Why do we have to get into that?
15 MS. ANDERS: I don't think you have to get
16 into it, Justice Scalia. I think --
17 JUSTICE SCALIA: Which means we shouldn't.
18 (Laughter.)
19 MS. ANDERS: Well, that may be the case, but
20 I think we are simply trying to -- trying to explain to
21 the Court what we think how the rule should be applied
22 in the district court, in the -- in the ordinary case,
23 and then, in the rare case, this one, where the
24 defendant has waived, and permitting the settlement to
25 go forward, it wouldn't adversely affect the public

1 interest that are normally in force here.

2 CHIEF JUSTICE ROBERTS: Do you have an

3 example of the non-ordinary case? I mean, you seem to

4 say, either -- I guess it's not always after judgment

5 that it shouldn't be implemented, I guess. But when

6 wouldn't it be after judgment?

7 MS. ANDERS: I think that the -- that in

8 general, the requirement would be considered waived if

9 it's not raised before judgment. We can't think of a

10 case in which the extraordinary circumstance would be

11 fulfilled.

12 CHIEF JUSTICE ROBERTS: So it's more -- so

13 it's more or less jurisdictional after judgment?

14 MS. ANDERS: No, I'm sorry. What I meant to

15 say was that I don't think this rule could ever be

16 enforced, in the first instance, on appeal if it has

17 been waived below. I think the general civil rule for

18 non-jurisdictional requirements is that if it's not

19 raised before judgment, it's lost on appeal --

20 circumstances --

21 JUSTICE SCALIA: Well, that's normal, but

22 not invariable.

23 MS. ANDERS: Well, I think that's the

24 rule -- that's the rule that this Court has applied to

25 constitutional rights with the plain error rule, and

1 also, with respect to structural constitutional rights
2 that might implicate other public interests, the general
3 rule is that if the requirement has not been raised
4 during the -- during the trial stages of the case, then
5 it can't be enforced for the first time on appeal.
6 JUSTICE SCALIA: Unless it is plain error.
7 MS. ANDERS: Unless it's plain error, and in
8 this situation, if the plain error standard applied, or
9 something even more -- even more heightened in the civil
10 context, we can't think of a case in which registration
11 requirements --
12 JUSTICE SCALIA: It's pretty plain that the
13 things haven't been registered. I mean, right? And
14 it's pretty plain that if they hadn't been registered,
15 the district court should not have proceeded with the
16 case. So I don't know why it wouldn't normally be plain
17 error in -- in the court of appeals.
18 MS. ANDERS: Well, I think those -- those
19 circumstances would be true in most cases in which the
20 -- for some reason, the requirement hadn't been reached
21 at the trial stage. So I don't think that the
22 extraordinary circumstance is present here that would
23 justify overturning the independent interest in judgment
24 that our legal system has, the finality of judgment, the
25 rights of the parties in relying on that judgment and

1 the judicial resources expended.

2 You know, I think in some ways we can think

3 of this requirement as sort of like a filing fee, that

4 it's -- it serves interests beyond those of the parties

5 at the district court, and therefore you wouldn't think

6 of it as waivable at the instance of the defendant. But

7 --

8 CHIEF JUSTICE ROBERTS: There really are, in

9 our recent decisions, it seems to me, two different

10 lines of authority. There is the Bowles and the John R.

11 Sand and Gravel, which treats these sorts of things as

12 jurisdictional, and the Arbaugh line that doesn't. And

13 it does seem to me that the language here, "No suit

14 shall be instituted," sounds an awful lot like "suit

15 shall be barred," or the other language in -- in Bowles.

16 MS. ANDERS: I think it's similar to a lot

17 of language that's used in statutes of limitations,

18 which are traditionally considered non-jurisdictional,

19 that no statute -- no suit shall be instituted.

20 I think what's important is that it speaks

21 in terms of the actions of the parties, because the

22 parties institute a suit, not the Court. So it doesn't

23 speak in terms of the power of the Court. And there's

24 no evidence, I don't think, that Congress intended to

25 withdraw the broad grant to jurisdiction in 1331 and

1 1338. I think Bowles and John R. Sand are cases in
2 which the Court's own precedents had previously treated
3 the rules at issue as jurisdictional, had accorded them
4 jurisdictional consequences. So those are cases in
5 which the Court relied on stare decisis, but I don't
6 think that we have any similar situation here. There's
7 no --
8 JUSTICE GINSBURG: What about the
9 congressional reaction to the Second Circuit's decision?
10 It provided that the -- there was to be no
11 jurisdictional bar in criminal matters. Didn't -- it
12 didn't affect jurisdiction in criminal matters, but it
13 didn't say anything about civil matters. So isn't that
14 some kind of reflected acceptance that in some of the
15 civil -- in civil cases, it would be jurisdictional?
16 MS. ANDERS: I don't think so. I think, in
17 enacting that, Congress had recognized that the
18 incentives for registration should stay in place in the
19 civil context, but that making an exception wouldn't --
20 wouldn't make a difference in the criminal context.
21 I think Congress still spoke of it as a --
22 as a non-jurisdictional requirement in the legislative
23 history, so I don't think that there is any indication
24 that Congress has ratified the Second Circuit's decision
25 here.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Ms. Anders.
3 Ms. Merritt?
4 ORAL ARGUMENT OF DEBORAH JONES MERRITT
5 AS AMICUS CURIAE IN SUPPORT
6 OF THE JUDGEMENT BELOW
7 MS. JONES MERRITT: Mr. Chief Justice and
8 may it please the Court:
9 We will start with the statutory language as
10 the Court has been discussing for the last half-hour.
11 Section 411(a) appears on page 1 of the
12 Petitioner's brief. It uses, first, the mandatory word
13 "shall" in commanding that no action shall be
14 instituted.
15 It does not contain a limitations period, as
16 statutes of limitations do. It simply says, "No action
17 shall be instituted." No waiver --
18 JUSTICE SCALIA: "Until." That's a
19 limitation period.
20 MS. JONES MERRITT: Until?
21 JUSTICE SCALIA: Until preregistration or
22 registration has been made.
23 MS. JONES MERRITT: That's correct, Justice
24 Scalia, and that makes --
25 JUSTICE SCALIA: That's our limitation

1 period.

2 MS. JONES MERRITT: That makes -- it's a --

3 it's a requirement that registration be made. It is

4 quite analogous, although stronger than the statute in

5 the Hallstrom case. The hybrid argument that the

6 Solicitor General was referring to is the Court's

7 decision in the Hallstrom case, which was a provision of

8 the environmental statutes that is common in several of

9 those statutes providing: No action may be commenced

10 until a notice is filed.

11 Our provision here is stronger. It says:

12 "No action shall be instituted," instead of "No action

13 may be commenced." Even if this case is not -- even if

14 this statute does not impose a jurisdictional limit,

15 which I will strongly argue that it does, it at the very

16 least imposes a mandatory command like the statute in

17 Hallstrom. And there is no reason in this case to

18 reverse the Second Circuit, even if this is a mandatory

19 provision.

20 As you will recall, in Hallstrom, the

21 parties had gone through four years of complicated

22 environmental litigation. Went up through the court of

23 appeals. The court of appeals reversed, saying, you did

24 not comply with this notice provision. This Court held

25 that it did not need to decide whether that provision

1 was jurisdictional in the strictest sense of the term,
2 because it was at least mandatory. And the Court
3 reversed despite that time, sent the case back.
4 In fact, I believe, Mr. Chief Justice, you
5 asked about whether the mandatory issue would be within
6 the Court's grant of certiorari. The grant of
7 certiorari in Hallstrom referred to the jurisdictional
8 issue and the Court decided that rather than get to the
9 strict issue of jurisdiction, it would decide on a
10 mandatory forum.
11 But there is no reason, if we are -- if the
12 Court wants to avoid the jurisdictional issue and to
13 endorse the mandatory hybrid one, the Second Circuit
14 should still be affirmed in this case. The parties
15 raised Section 411(a) quite clearly to the district
16 court. They used this provision as their major defense
17 of both the substance of the settlement's fairness and
18 the representation. The representation was the major
19 issue that the objectors raised in the district court.
20 And so both parties, the Plaintiffs and the defendants,
21 argued in their briefs -- and it's simply not a few
22 sentences; we've provided the parts of the record in the
23 appendix to our brief -- that the reason that this
24 settlement should be upheld was because of this
25 mandatory, they called it then, jurisdictional

1 provision. That was an essential argument that they
2 made to the district court and that they then repeated
3 to the Second Circuit in the merits briefs long before
4 the circuit said, then: Wait a minute; you are making a
5 curious argument here that this is a jurisdictional
6 provision that upholds your settlement, but that we
7 still have the ability to look at this settlement if
8 it's jurisdictional.
9 I would like to return to the language of
10 Section 411(a). As I have argued, it begins with this
11 mandatory language, "No action shall be maintained."
12 JUSTICE GINSBURG: In -- aren't there
13 statutes that have exhaustion requirements, or like the
14 EEOC filing requirement, that say, you can't sue until
15 you have gone to X administrative agency? And those are
16 not considered jurisdictional.
17 MS. JONES MERRITT: That's correct. That's
18 correct, Justice Ginsburg. Many of those statutes refer
19 specifically to exhaustion. The Prison Litigation
20 Reform Act, for example, that some of the parties cite,
21 refers specifically to exhaustion of remedies after the
22 "no action" sort of language.
23 Every jurisdictional statute has its own
24 language and its own story. We could say they are like
25 Tolstoy's unhappy families; they are all different. And

1 in this case, the story of the Copyright Act and its
2 language is very distinctive, both in the public
3 purposes that it furthers and in the language that it
4 uses.
5 Again, on the statutory language, we have
6 the very mandatory language, "no action shall be
7 instituted." No modifiers; there's no provision for
8 waiver. The Solicitor General's assistant mentioned
9 that this statute is like fee waivers. It's not at all
10 like a fee waiver, because the statute for fee waivers
11 explicitly gives the district judge authority to waive
12 the fee in the case of an in forma pauperis plaintiff.
13 This statute contains no waiver for the parties. It
14 contains no discretion for the district judge.
15 And in the last word of -- the last sentence
16 of this very short three-sentence provision, Congress
17 referred explicitly to jurisdiction. And I would like
18 to look very closely at that word, because any plain
19 reading of this section will show -- shows that Congress
20 intended the entire provision to refer to the
21 jurisdiction of the court.
22 JUSTICE GINSBURG: I thought that -- that
23 last sentence is just relating to the court can -- has
24 authority to decide this particular issue,
25 copyrightability, even though the registrant has chosen

1 not to enter the suit. The sentence simply says, court,
2 you have authority to decide this question.
3 MS. JONES MERRITT: That's the most
4 immediate reference, Justice Ginsburg, but the three
5 sentences work together. And if we look at the three
6 sentences, they appear on the first page of the
7 Petitioner's brief. The first sentence creates two
8 categories of cases: Those that the Court may decide
9 and those it may not. Let us say for now we are not
10 meaning what that power is. We are simply saying two
11 categories of cases, one the court may decide, the other
12 one it may not.
13 The second sentence then adds a small group
14 of cases to this first category, the one that the court
15 may decide. As opposing counsel mentioned, Congress did
16 that in response to a particular case, the Vacheron
17 case. Vacheron itself was built on a line of cases
18 holding that the previous section like 411(a) was a
19 jurisdictional limit.
20 The reason that courts could not consider a
21 copy -- an application for -- a petition for
22 infringement complaint, I'm sorry, from a person who had
23 not yet gotten registration was because they construed
24 that predecessor as jurisdictional and therefore, they
25 had no jurisdiction to hear an infringement claim until

1 this person instituted a mandamus suit and got the
2 certificate from the registrant.
3 CHIEF JUSTICE ROBERTS: I would have thought
4 that cut against you in the sense that the same
5 paragraph Congress used the word "jurisdiction," but
6 they didn't use that in the provision that you are
7 arguing, does deprive the court of jurisdiction.
8 MS. JONES MERRITT: No, Mr. Chief Justice,
9 because when Congress revised this statute in 1976, it
10 had before it 60 years already of courts construing its
11 language, no action shall be maintained, which was the
12 previous 1909 language as a jurisdictional limit. There
13 had not been any resistance to that notion.
14 Even courts as early as the 1920s in the
15 Lumiere case, the Second Circuit did not hold there was
16 "jurisdiction," but it held that this provision was
17 unwaiverable. What the parties want to do here, of
18 course, is to waive the provision.
19 So the language was working quite nicely for
20 Congress. No action shall be maintained, they switched
21 it to instituted to make clear that they meant at the
22 beginning of the action. There had been a few parties
23 who had argued during the early 20th century that if
24 they snuck in the door, they could remain inside -- or
25 I'm sorry, once they got inside, they could file the --

1 certificate, and the courts rejected that, but Congress
2 cleared up that particular problem.
3 So Congress knows that its first sentence is
4 working quite well. Congress then adds this second
5 sentence to -- these, of course, are people working with
6 the Copyright Office, experts in the area of copyright
7 law. Congress adds the second sentence which adds the
8 small category of cases to the ones that may come before
9 the court. And then in the final sentence, Congress
10 gives a clarification about that final group of cases.
11 As Justice Ginsburg said, the -- Congress
12 made clear that when the registrar decides not to appear
13 in these cases, the Court may still go on and has the
14 power to decide these cases.
15 CHIEF JUSTICE ROBERTS: It's not -- it's not
16 a very big deal to register your copyright, right?
17 MS. JONES MERRITT: It is not at all a big
18 deal, Your Honor. In fact, for freelance writers one
19 may register an entire year's worth of work on a single
20 form for $65.
21 CHIEF JUSTICE ROBERTS: And -- but -- but
22 doesn't that mean that it would be odd to make
23 jurisdiction over an action for infringement hinge on
24 whether you've, you know, dotted an "I" and crossed a
25 "T"?

1 MS. JONES MERRITT: Not at all, Your Honor,
2 because again, the copyright statute has a different
3 history than other jurisdictional statutes. Before
4 1909, owners of copyright had to dot every "I" and cross
5 every "T" within a limited period of time. If they
6 didn't, they lost their entire ownership in the
7 copyright.
8 What Congress wanted to do in 1909 was to
9 give copyright owners a longer period of time to comply
10 with some of these formalities. But, it still wanted to
11 preserve the public interest that registration serves.
12 We haven't talked yet about the major public
13 interest that Congress had in mind here. It is
14 ironically the very problem that gave rise to this
15 lawsuit, trying to find the owner's of copyrighted
16 works.
17 Before using a copyrighted work, any person
18 needs to find the owner to ask permission. The
19 electronic databases in this case have argued that they
20 are somehow special, that because they need to obtain
21 many permissions, they shouldn't have to do it.
22 Universities, libraries, archives obtain as
23 many or more permissions as electronic databases in
24 every year. For large universities like Harvard
25 University or the Ohio State University, we have to

1 obtain permissions for every article that is distributed
2 in course packs to our students.
3 If one of those articles is a freelance
4 work, written by Mr. Muchnick, for example, we have to
5 track him down and get his permission to use that
6 article.
7 So the registration system was Congress's
8 response to this problem of finding the owners of
9 copyright. In this --
10 JUSTICE GINSBURG: Isn't it true, though,
11 that -- that most copyright holders, most people who
12 write articles, freelance articles, even if it's only
13 $65, it's not -- it's not worth it because they really
14 don't expect to get -- they don't think anybody is going
15 to infringe, in the first place, and if they did what
16 establishes to be, just wouldn't be economically
17 worthwhile? So I think it's a fact that most copyrights
18 are not registered, isn't it?
19 MS. JONES MERRITT: The beauty, Your Honor,
20 though, of the solution that Congress adopted with the
21 registration, moving the registration to a
22 jurisdictional element rather than to an element of the
23 claim, as it was in the 19th century, is that the
24 copyright owner may do this any time. Copyright lasts,
25 of course, for the lifetime of the owner plus another

1 70 years after death. Sixty-nine years after my death,
2 my heirs could register my copyright if they are finding
3 that somebody is now making a lot of money off of my
4 works. And they could then bring an infringement suit
5 against that person.
6 It's odd to think of a jurisdictional
7 restriction as being a looser element than a claim
8 element, but in this particular story of copyright, it
9 is.
10 What Congress did was to say, we want people
11 to own copyrights immediately without complying with
12 formality. And in 1976, Congress even extended that to
13 unpublished works, so I already have a copyright of the
14 notes I have in front of me and in the e-mails I print
15 last night and so forth.
16 What Congress said, with this huge sea of
17 copyrighted works, before somebody can bring an
18 infringement action in the Federal court, we want them
19 to confer a public benefit. We want them to register
20 the copyright so that other people can find the owner
21 and request permission.
22 What will happen in this case under the
23 terms of this settlement is that the defendant who did
24 not take time to find the owners of these works, even
25 though the owners of these works were easier to find

1 than many of the very elusive of works that archives and
2 historical societies search for, they did not find --
3 look for the owners because they thought it would be too
4 difficult.
5 This settlement now gives the defendants a
6 perpetual right to use all of those works without ever
7 identifying the owners, and without the owners ever
8 being identified on the national copyright register,
9 which is what Congress wanted.
10 If I want to create a competing database for
11 any of the defendants, I have to undertake the arduous
12 work of tracking down all the owners.
13 JUSTICE BREYER: Well, there's some that
14 can't be found. So if we take your position, there's
15 some that can't be found, we just can't create our
16 database.
17 MS. JONES MERRITT: Justice Breyer --
18 JUSTICE BREYER: I mean, that's the problem
19 that's underlying the fairness of this thing.
20 MS. JONES MERRITT: I'm --
21 JUSTICE BREYER: In terms of if we take your
22 approach, no matter how hard it is to find owners, you
23 are just out of luck. That is to say, there will not be
24 databases collected, because they cannot be complete
25 because we cannot find the owner. If we take the

1 position that it is sometimes waiverable, that obstacle
2 disappears and now it's a question of the fairness of
3 the situation.
4 MS. JONES MERRITT: Justice Breyer, that
5 concern exists for everybody, not just for electronic
6 databases. In fact, there is -- the copyright --
7 JUSTICE BREYER: That's right. I just
8 wonder why Congress would have ever wanted this kind of
9 provision to serve as that kind of obstacle in any area.
10 MS. JONES MERRITT: Because Congress wants
11 to protect the rights of copyright owners. Congress has
12 more than 200 years' experience balancing these two
13 interests. And, in fact, as we speak, Congress is
14 considering orphan works legislation to address that
15 specific issue. What Congress has -- and that
16 legislation would apply to all types of works,
17 electronic databases, national archives, historical
18 documentaries.
19 And what Congress is proposing in that
20 legislation is quite illustrative. Congress says that
21 if somebody makes a diligent search and cannot find the
22 owner, then the person may use the work --
23 JUSTICE BREYER: That's the underlying
24 fairness. There might be -- maybe they will win on
25 that. I don't know what the merits of that are. But

1 certainly an absolute bar might sometimes help some
2 copyright owners, but many times it will hurt them,
3 because since they can't be found they can't be
4 compensated. And if we set up a system and put some
5 money in it, so if they are ever found they will be
6 compensated, that will help them.
7 So that's why I ask the question, why would
8 a Congress, that wants to help copyright owners create
9 this kind of system? When all the things you are
10 talking about can be brought into play when we consider
11 the fairness of the system.
12 MS. JONES MERRITT: This is a -- the system
13 that Congress put in play is, Your Honor, one in which
14 copyright owners have an absolute right to control the
15 disposition of their works. That is the current system,
16 even without getting to the jurisdictional issue.
17 Congress may change that disposition, and that is within
18 Congress's control. What they have been trying to do is
19 to balance the interest of the copyright owner with the
20 interest of the public in using works. And that is the
21 perennial challenge in copyright law, how to balance
22 those two interests.
23 Section 411(a) is actually a vital cog as
24 part of that balance, because what Section 411(a) does
25 is it says to the copyright owner don't worry about all

1 this business of registering or anything else, you have
2 your copyright, and you will have it for your life plus
3 70 years. If it ever becomes important to you to bring
4 a lawsuit, then you can register at that time, come into
5 court. It's a deal that Congress has offered to
6 copyright owners in order to strike this particular
7 balance between the public interest and the private
8 interest.
9 JUSTICE GINSBURG: Do they -- if they are
10 just suing, not for money but for an injunction, do they
11 have to register before bringing an injunction suit?
12 MS. JONES MERRITT: Yes, Your Honor, they
13 do. In order to bring any action -- if the injunction
14 is based on infringement. So we're -- if the plaintiff
15 brings an action for infringement and the remedy they
16 seek is an injunction, then the copyright must be
17 registered first.
18 There are some cases in the lower courts in
19 which we have a plaintiff who has a longstanding pattern
20 of infringements that a particular defendant has been
21 engaged in against that plaintiff. The Owen Mills case
22 is an example. A local photography studio was upset
23 because a photo duplicating shop kept copying their
24 copyrighted photographs. They entered an action for
25 infringement, had registered several of the photographs.

1 The Court issued an injunction that covered future works
2 as well, but those were all works within the same
3 judicial controversy. So an injunction could reach
4 further than a single registered work as long as we are
5 talking about one single controversy.
6 In this case we don't have an injunction, we
7 have damages, and we have thousands of different
8 controversies. As the Court knows the class action
9 rules do not change the substantive law or the rules of
10 -- of jurisdiction. We have here thousands of different
11 controversies that have been aggregated for convenience
12 under rule 23(b)(3), but the court must have
13 jurisdiction over each of those controversies. Or if we
14 take the alternative route of Hallstrom, the hybrid
15 approach, and we say that this is a mandatory
16 requirement. Congress has been quite clear about this
17 mandatory requirement, and that mandate must be
18 satisfied with respect to every controversy in this
19 class action.
20 JUSTICE STEVENS: May I ask -- I just hate
21 to reveal my ignorance on something like this, but I had
22 the same problem with your opponent. I really don't
23 understand why it makes any difference whether you call
24 a requirement mandatory or you call it jurisdictional in
25 terms of the fairness of settlement, all the

1 considerations you are discussing. It seems to me as a
2 practical matter it doesn't seem to make any difference.
3 MS. JONES MERRITT: It depends on the brand
4 of mandatory, Your Honor. There are in this case three
5 different proposals before the Court. I, as appointed
6 amicus I have argued that Section 411(a) is
7 jurisdictional which I think the clear history and
8 language of the statute, which I will still come back
9 to --
10 JUSTICE STEVENS: But would you not make all
11 the arguments directed at the fairness of the
12 settlements and so forth if it were merely mandatory?
13 MS. JONES MERRITT: Yes, because then the
14 two versions of mandatory are -- the flavor of mandatory
15 that the Solicitor General urges is that the district --
16 this is very mandatory, as in Hallstrom -- even if a
17 party doesn't raise the issue, the district court sua
18 sponte should raise the issue on its own.
19 JUSTICE GINSBURG: The -- so mingle -- rule.
20 I think Ms. Anders answered that question. In this
21 situation it would be appropriate for the judge to
22 accept the waiver.
23 MS. JONES MERRITT: That was -- that was
24 what Ms. Anders argued. I disagree with that, because
25 the public interest that Congress has put forth here

1 would not be satisfied. The parties in this case argue
2 the same public interests that parties argue in every
3 copyright case. The plaintiffs in a copyright case
4 always argue that their interest should be protected
5 even if they haven't complied with Congress's mandates.
6 The defendants in a copyright case always argue that
7 allowing them to copy the plaintiffs' works would give
8 the public greater access to those works. There are no
9 special public interests here.
10 In fact, the electronic databases in this
11 case have been superseded technologically.
12 JUSTICE GINSBURG: If we -- if we are
13 talking about the ordinary case, and someone sued for
14 infringement apart from this settlement in the context
15 that we are in, certainly it's not going to raise that
16 question whether it's mandatory, optional or whatever.
17 What defendant who is sued for infringement wouldn't
18 say, judge, I'm relying on 411(a); they haven't
19 registered their copyright; they can't sue me? I can't
20 imagine a defendant in an ordinary copyright case who
21 wouldn't raise it.
22 MS. JONES MERRITT: Actually there are quite
23 a number, Your Honor, just as there are defendants who
24 will waive statutes of limitations. There are times
25 when a defendant would rather have the resolution on the

1 merits, because that then would not allow the plaintiff
2 to come back into court and sue again. Or the
3 defendant -- the plaintiff in this case might have sued
4 -- that you are referring to -- might have sued for
5 infringement, and the defendant wants to make clear that
6 it has the right to use this work. That would then
7 establish that principle with this plaintiff with
8 related works or with other works.
9 JUSTICE GINSBURG: Then let's switch to the
10 plaintiff. If the plaintiff is in it for money, for
11 real money, for damages, the plaintiff's going to
12 register because then the stakes are such that $65 is
13 well worth it, if the plaintiff thinks it can get a
14 large infringement award.
15 MS. JONES MERRITT: The problem, Your Honor,
16 is that there are many naive people who believe that
17 famous movies and novels have infringed their freshman
18 college essays. There are cases exactly like that in
19 the courts. And in fact the case I cite in the brief is
20 one in which the author sued the university, claiming
21 that the department of English obviously had released
22 his freshman essay to Hollywood, because this movie
23 built upon his fresh man essay.
24 In those cases, and this is another
25 distinction, Justice Stevens, between mandatory and

1 jurisdictional, the defendant doesn't even have to
2 appear. The district court can sua sponte dismiss the
3 complaint for lack of jurisdiction. We cite I believe
4 seven or eight cases in the brief where exactly that
5 happened, including two different cases --
6 JUSTICE BREYER: They wouldn't waive it
7 then. I mean, the problem, I take it, realistically is
8 this: let's take a group of people who want to make
9 databases; now they want to use copyrighted material.
10 There is a subset of people who have written it they
11 can't find, so they say here's what we will do. We will
12 take $100 billion, and we will put it in a fund, and
13 like ASCAP, that fund can administer this money for the
14 benefit of anyone who turns up.
15 Now, maybe that's illegal under some law.
16 Maybe the class isn't right. Maybe they can't get
17 proper representation. Maybe it's inadequate, et
18 cetera. But what I don't fail to see -- what I fail to
19 see, is how -- whether you could do that or not do it
20 has anything to do with registration, because we are
21 talking about the people who aren't here, all of whom,
22 if you ever bring suit when he's found, will register
23 the copyright. The only reason they haven't registered,
24 we don't know who they are, that's why. Maybe they have
25 registered, for all we know.

1 MS. JONES MERRITT: All of the people who
2 haven't registered yet, Your Honor, will not be able to
3 bring suit, because the class action will extinguish
4 their claims. That's the important --
5 JUSTICE BREYER: Maybe they can't do that
6 because it would be an unfair result. But where is it
7 in this provision of law that's designed to stop that
8 ever from happening?
9 MS. JONES MERRITT: This provision, if we go
10 back to section --
11 JUSTICE BREYER: Maybe it won't, by the way.
12 MS. JONES MERRITT: Right.
13 JUSTICE BREYER: It depends on what the
14 terms of the settlement are. We could have a subclass
15 that allows a subset of those people to come into court.
16 No reason you couldn't. So I don't know whether or not
17 it's true that they won't register when they are found.
18 MS. JONES MERRITT: Justice Breyer, once
19 again the Copyright Act itself already makes that choice
20 that no person may -- and I'm not talking yet even about
21 the jurisdictional provision -- no person may use
22 another's copyrighted work without their permission.
23 JUSTICE BREYER: In 1909 Congress thought
24 all this through with the databases and so forth?
25 (Laughter.)

1 MS. JONES MERRITT: Oh, yes. The database
2 issue -- sometime -- sometimes -- in 1976, by the way,
3 Congress did because LEXIS and Westlaw existed before
4 1976. The -- but the databases are a red herring here.
5 Sometimes, technology is different, and,
6 sometimes, it's not. The Library of Congress recently
7 did a project in which they sought 7,000 permissions for
8 a single project because they were digitizing the
9 letters of Hannah Arendt.
10 They sought those permissions. They -- if
11 they could not get permission, if they couldn't find the
12 author or if they didn't get an okay from the author,
13 they had to leave the work off of the web site because
14 they are following copyright law.
15 They have a copy of the original work that
16 was given to them or that they purchased, and they may
17 display that, but, if they are going to make a copy of
18 the work, then they have to comply by copyright law.
19 I mentioned a moment ago that the databases
20 here have been superseded by technology, and that is
21 another way in which technology is not -- is not
22 different in this case. It is now possible for works to
23 be scanned in photographic form or PDF form and put in
24 to electronic databases that are fully searchable, and
25 that does not violate copyright law.

1 If you compare, for example, law review
2 articles on --
3 JUSTICE BREYER: But why doesn't it? Just
4 out of curiosity. You are making a --
5 MS. JONES MERRITT: Because it is -- it is
6 part of the original collection -- I'm sorry. If the --
7 if the publisher of the collected work consents to that.
8 I am thinking of this case in The New York Times --
9 JUSTICE BREYER: Well, you say if somebody
10 who owns the copyright.
11 MS. JONES MERRITT: Yes. But who owns --
12 JUSTICE BREYER: Yes. No. No. But what we
13 want to do is we want to have, in our database, all of
14 the material written about slavery, and, lo and behold,
15 there are 4,000 books that we can't trace. Who, now,
16 owns the copyright 100 years later? And there is no way
17 to get those into our database. Whether --
18 MS. JONES MERRITT: That's correct. That is
19 correct.
20 JUSTICE BREYER: All right. Now, that's a
21 sort of loss, and my same point, that maybe that's as it
22 should be, but it's rather surprising that this law is
23 the law that will answer that question.
24 MS. JONES MERRITT: This law relates to the
25 question, Your Honor, because this law relates to the

1 access to the Court.

2 The way it relates to the question is that

3 what Congress was trying to do was to give people like

4 you and me information about those copyright owners, so

5 that we could find the owner of the book on slavery.

6 And, as a way to maintain that register,

7 which Congress started in 1790, it said, to the authors

8 of copyrighted works, if you want to use our courts, the

9 judicial powers of the United States, you need to confer

10 this benefit, so that Justice Breyer could find you, if

11 he wants to include your work in the database. And that

12 was the story that Congress did.

13 I would like to say just one more word about

14 the word "jurisdiction" in the third line of Section

15 411(a) because we were interrupted there. The parties

16 have offered no convincing explanation for that word,

17 other than to show that Congress understood this whole

18 provision was jurisdictional.

19 It refers, most immediately, to

20 registrability, but that was not a new issue in 1976.

21 Courts have always decided registrability. And, as the

22 rules of civil procedure make clear to us, a party's

23 absence never deprives a court of subject matter

24 jurisdiction.

25 JUSTICE GINSBURG: So the rulemakers got it

1 wrong in Form 19, when they did not write 411(a) as
2 jurisdictional. They say copy the 1331, 1338, that is
3 jurisdictional, and then they put the certificate
4 requirement below the line -- below the jurisdictional
5 line.
6 So that was -- well, that was wrong, in your
7 judgment.
8 MS. JONES MERRITT: As the -- as the
9 Congress made -- I'm sorry, as the Court made clear, in
10 issuing those forms, they are advisory only, and they
11 are not -- they are not intended to give legal advice to
12 counsel about what the issues in the case are.
13 JUSTICE GINSBURG: I suppose, if you picked
14 up any copyright complaint, you will see the
15 jurisdictional allegation will say 1331, 1338, and
16 nothing about 411.
17 MS. JONES MERRITT: And that is quite
18 common, Your Honor, because, in many situations, what
19 Congress has done is given a general grant of
20 jurisdiction in 1331 or 1338 and then pulled it back for
21 a subcategory of cases, which is what 411(a) does.
22 In those circumstances, not just in
23 copyright, but in all sorts of areas, the complaint will
24 plead jurisdiction under the general grant and then may
25 show that it satisfies the condition later.

1 This is -- we are not arguing that -- and
2 the Second Circuit has not argued that 411(a) is a
3 jurisdictional grant. It is a section that takes back
4 part of the jurisdictional grant in 1331 and 1338.
5 Congress has more than 200 years' experience
6 working with copyright law, as the questions today have
7 revealed -- I'm sorry.
8 CHIEF JUSTICE ROBERTS: Finish your
9 sentence.
10 MS. JONES MERRITT: And the questions today
11 have revealed striking the balance between the public
12 and the private interest is a difficult one.
13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 MS. JONES MERRITT: Thank you very much.
15 CHIEF JUSTICE ROBERTS: Mr. Sims, you have
16 two minutes remaining.
17 REBUTTAL ARGUMENT OF CHARLES S. SIMS
18 ON BEHALF OF THE PETITIONERS
19 MR. SIMS: Thank you, Your Honor.
20 I, first, want to correct the misimpression
21 given that the databases think they are special. The
22 databases haven't thought they don't need to get
23 permission. They thought they had permission under
24 Section 201(c), and this Court had the case and
25 decided -- two of you believed we were right, and more

1 of you believed we were wrong, but the databases took no
2 position that they had no obligation.
3 They got the rights by contract from the
4 publishers, with representations and warranties, and
5 that's why, when this case was instituted, they went to
6 mediation. They resolved this in a way. They got money
7 from the publishers, who were exposed under
8 representations and warranties.
9 The authors were represented by the three
10 major national freelance author groups in the country,
11 and this was a way, we thought, to address this problem
12 responsibly and without taking the Court's time.
13 Now, Mr. Chief Justice Roberts, you said a
14 couple of times that you wonder whether the language
15 here, "No action shall be instituted," doesn't sound
16 jurisdictional, and exactly to the contrary, the Court's
17 decision of Jones v. Bock, which, I think -- if I am
18 remembering, you authored, but, in any event, it was
19 within a year or two, said that was boilerplate language
20 used all the time for statutes of limitations that are
21 not jurisdictional. And, indeed, that is correct.
22 In the footnote of our reply brief, we list
23 three times in the 19th century when that very language
24 was used for statutes of limitations. And, if you put
25 it into LEXIS or Westlaw, you will get a zillion

1 statutes with respect to -- exhaust nonjurisdictional
2 statutes.
3 So I think, quite to the contrary, that --
4 that is the language Congress uses when it wants
5 something to be not jurisdictional.
6 Now, Ms. Merritt began with the word
7 "shall," in 411(a). I want to be clear. This case was
8 instituted in compliance with 411(a). The named
9 plaintiffs registered their works and came into court.
10 It went to mediation, and the next thing the court knew,
11 it had a settlement agreement to review, and it did
12 review under Rule 23.
13 She relies on the Hallstrom case, but, of
14 course, the Hallstrom case, which did avoid saying
15 whether it was mandatory or jurisdictional, involved the
16 enforcement of a mandatory -- at least mandatory rule,
17 on the application of a party, and that's what the Court
18 does, and that's why, to some extent, other than with
19 respect to settlement agreements, this case doesn't
20 matter a lot because the defendants will always be
21 raising this defense.
22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Merritt, you were appointed by this
24 Court as an amicus to defend the judgment below, and you
25 have ably discharged that responsibility.

1 On behalf of the Court, thank you for doing
2 so. The case is submitted.
3 (Whereupon, at 12:08 p.m., the case in the
4 above-entitled matter was submitted.)
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