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GOOD INTENTIONS GONE WRONG: THE COPYRIGHT ACT'S SAFE HARBOR PROVISION AND THE REQUIREMENT OF ACTUAL KNOWLEDGE

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ABSTRACT

In 2008, Congress enacted the Copyright Act's safe harbor provision which called for more lenient treatment of mistakes in copyright applications. The enactment helped to close the loophole where a copyright application could be invalidated for a material mistake in the application, precluding a cause of action for copyright infringement and statutory damages. However, interpreting and applying the safe harbor provision has given rise to disputes among district and appellate courts. There is a split on what standard the statute's language requires to render a copyright application invalid. Under the safe harbor, in part, invalidation of a copyright requires that the alleged copyright holder included the inaccuracy "with knowledge." Courts have been split on whether this language evinces an actual knowledge standard versus a showing that the alleged copyright holder included the inaccuracy with an intent to fraud or as some courts phrase it, the inaccuracy was included with a "scienter of fraud." The most recent interpretation of the safe harbor provision was handed down by the Supreme Court in 2022 in a case named *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.* In this case, the Court side-steps the dispute of the lower courts and interprets the safe harbor provision as requiring a showing of actual knowledge solely. This case note argues that the decision was flawed for various reasons, creates an impossible standard, and calls on Congress to amend the language of the statute and require that the safe harbor provision includes an intent to fraud standard as opposed to an actual knowledge standard.



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I. INTRODUCTION

The American copyright system requires that a copyright holder must register his work with the United States Copyright Office in order to bring a claim for infringement against another party.¹ This has been a long-lasting requirement dating back to 1976 and inaccuracies in the applications were enforced strictly.² In 2008, Congress enacted the Copyright Act's safe harbor provision which called for more lenient treatment of copyright application inaccuracies.³ The safe harbor excuses inaccuracies made unintentionally and provides guidance in the event that an inaccuracy is intentional.⁴ Courts have penalized applicants who intentionally remain ignorant of their inaccuracies.⁵ However, the Congressional act, originally aimed at more leniency, has created a standard that leaves the American copyright system vulnerable to fraud.

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¹ Copyrights, 17 U.S.C. § 411. Section 411 of the Copyright Act sets out the requirements for copyright registration and civil infringement actions. *Id.* Section (a) sets out the specific formal requirements for bringing a lawsuit for statutory damages. *Id.* The statute states that “no 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.” *Id.* This requirement acts as both a notice to the public and a prerequisite for a claim of statutory or actual damages. *Id.*

² ROBERT A. GORMAN ET AL., COPYRIGHT CASES AND MATERIALS 42 (9th ed. 2016). On March 1, 1989, the formal requirement of notice was removed from the Copyright Act; however, the formal requirement of registration before an action is brought has remained intact and was not precluded by the decision to remove the requirement of notice. *Id.*

³ See *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 948 (2022) (acknowledging that Congress enacted the safe harbor provision to make it less difficult for non-lawyers to obtain copyright registration). The Court acknowledges an additional aim of the statute being to “eliminate loopholes” in the registration process that can be used to preclude an otherwise bona fide author from bringing a suit for infringement. *Id.*

⁴ See 17 U.S.C.S. § 411(b)(2) (stating that “[i]n any case in which inaccurate information described under paragraph (1) is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.”).

⁵ *Unicolors, Inc.*, 142 S. Ct. at 948 (“Courts need not automatically accept a copyright holder's claim that it was unaware of the relevant legal requirements of copyright law. We have

This year, the Supreme Court of the United States rendered an opinion, *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, which raises questions about the courts' role in preserving the integrity of copyright enforcement.⁶ In *Unicolors*, a textile company sued the clothing retailer, H&M, alleging copyright infringement on Unicolor's textile design.⁷ In rejecting H&M's fraud allegations, the district court found in favor of Unicolors.⁸ H&M appealed.⁹ On appeal, the Ninth Circuit disagreed with the district court's analysis of the safe harbor provision and sided with H&M.¹⁰ Controversially, the Supreme Court found in favor of Unicolors, and overruled the lower court.¹¹

This case note argues that Congress should amend the safe harbor provision to require a showing of an intent to fraud and reverse the decision in *Unicolors*. The Court's rote application of the safe harbor provision inadequately addresses a contentious question of law, renders an opinion that is unclear, and fails to consider material circumstantial evidence. Part One of this note will cover the background of the relevant law and provide pertinent details about the *Unicolors* case. Part Two will analyze the shortcomings of the Majority's opinion. And lastly, Part Three will summarize why this decision is incorrect, why Congress should act, and proposes language that Congress should adopt in place of the current contentious language.

recognized in civil cases that willful blindness may support a finding of actual knowledge...[c]ircumstantial evidence, including the significance of the legal error, the complexity of the relevant rule, the applicant's experience with copyright law, and other such matters, may also lead a court to find that an applicant was actually aware of, or willfully blind to, legally inaccurate information.”).

⁶ *Id.*

⁷ *Id.*

⁸ *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194, 1200 (9th Cir. 2020).

⁹ *Id.* at 1198 (“The district court rejected H&M's argument for invalidating the '400 Registration for two reasons. First, the district court held that invalidation required a showing at trial that Unicolors intended to defraud the Copyright Office, and found no evidence introduced at trial showed such an intent. Second, the district court held that although Unicolors may have marketed and sold various works included in the '400 Registration separately, that did not mean all of the works were not first made available to the public—i.e., published—on the same day.”).

¹⁰ *Id.* at 1198 (explaining that the Ninth Circuit acknowledges that “several opinions [within their jurisdiction] have implied that there is an intent-to-defraud requirement for registration invalidation... [b]ut we recently clarified that there is no such intent-to-defraud requirement.”).

¹¹ The Court said:

[c]ase law and the dictionary instruct that “knowledge” has historically “meant and still means the fact or condition of being aware of something . . . If Unicolors was not aware of the legal requirement that rendered information in its application inaccurate, it could not have included the inaccurate information “with knowledge that it was inaccurate.”

Unicolors, Inc., 142 S. Ct. at 943.

II. BACKGROUND

A. The History of the Safe Harbor Provision

The Copyright Act governs an individual's right to their expressions fixed in tangible mediums.¹² Historically, copyright laws were created under the notion that an individual has a natural right to their "intellectual labors."¹³ Copyright grants an exclusive right to protect the use of an individual's expressions without the owner's consent.¹⁴ These protections extend to adaptations, reproduction, distributing, and public displays.¹⁵

The Copyright Act provides instruction for bringing a suit against alleged infringers.¹⁶ To bring an action for recovery, the plaintiff must first register their work with the United States Copyright Office.¹⁷ Once registered, the copyright owner receives a certificate as proof of copyright registration.¹⁸ The statute defines registration as "a claim in the original or the renewed and extended term of copyright."¹⁹ Possession of a certificate creates a *prima facie* presumption of validity.²⁰

¹² Copyrights, 17 U.S.C. § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .").

¹³ See GORMAN, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.* Copyright law protects various kinds of work ranging from "literary, musical, choreographic, dramatic and [other] artistic works . . . [t]he rights under copyright pertain to the reproduction, adaptation, public distribution, and public display or performance of a said work." *Id.*

¹⁶ 17 U.S.C. § 411

¹⁷ *Id.* ("Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no 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.").

¹⁸ 17 U.S.C. § 411(b)(1) ("A certificate of registration satisfies the requirements of this section and section 412." This certificate acts both as a prerequisite for remedy and evidence when bringing a suit for statutory damages.).

¹⁹ *Id.* § 101 ("Registration," for purposes of sections . . . 411,[and] 412, . . . means a registration of a claim in the original or the renewed and extended term of copyright.")

²⁰ 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 7.20 (2022). Nimmer writes "[w]hat if the misstatement results from inadvertence, rather than being the product of fraudulent intent? In *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, the Third Circuit suggested in dictum that "the correct approach in situations where there has been a material, but inadvertent omission" is not to invalidate the copyright but instead to deprive plaintiff of the *prima facie* presumption of validity that registration otherwise conveys. Other courts (including the First Circuit, again in dictum) follow the same rule." *Id.*

B. The Prerequisite of Registration Prior to the Safe Harbor Provisions Enactment

Courts have affirmed the prerequisite of registration prior to bringing a lawsuit.²¹ In *Cortes-Ramos v. Martin-Morales*, a songwriter sued a singer claiming copyright infringement.²² The First Circuit court rejected the songwriter's appeal, expounding that congressional history has repeatedly emphasized the requirement of registration prior to bringing an action.²³

But what happens if there is an error made in the application? The Copyright Office has established formal procedures to address this scenario.²⁴ The kinds of errors that can be corrected by the Copyright Office are errors that are not reasonably expected to be noticed and corrected by the Copyright Office.²⁵ Courts are generally very lenient and will forgive a “misstatement or clerical error” in the application.²⁶

However, not all application inaccuracies and errors are the result of mistake or mere negligence. Some inaccuracies in copyright applications are made with intent. The case *Gold Value Intl. Textile, Inc. v. Sanctuary Clothing, LLC*, illustrates this deceptive practice.²⁷

In *Gold Value*, a textile company sued a clothing retailer for infringing on their fabric design.²⁸ The company registered thirty-three fabric designs as an unpublished

²¹ *Murray Hill Publ'ns, Inc. v. ABC Commc's, Inc.*, 264 F.3d 622, 630 (6th Cir. 2001) (finding that a composer could not bring a claim after failing to obtain copyright registration); *see also* *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 2 (D.D.C. 2002) (holding “[p]laintiff alleging a claim of copyright infringement must obtain certificate of registration from Copyright Office, or refusal of Copyright Office to issue certificate, prior to initiating lawsuit”); *see also* *Unicolors, Inc.*, 142 S. Ct. at 948 (reinforcing the law that a copyright registration is a requirement to bring a statutory suit for damages).

²² *Cortes-Ramos v. Martin-Morales*, 956 F.3d 36, 42 (2020) (stating that “[i]n Section 411(a) of Title 17, the copyright statute provides that no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.”).

²³ *Id.* at 43. The court explained that the legislative history of the copyright law discussed by the Supreme Court is “quite clear.” *Id.* The predecessor to section 411(a) provided that “[n]o action or proceeding shall be maintained for infringement . . . until the provisions . . . with respect to the deposit of copies and registration of such work shall have been complied with.” *Id.*

²⁴ 2 NIMMER & NIMMER, *supra* note 20, § 7.18 (explaining that in order to obtain registration of a copyright, “the owner of copyright or of any exclusive right in the work must deliver to the Copyright Office an application for registration of the [work].”).

²⁵ *Id.*

²⁶ *Id.* Simply stated, a misstatement or clerical error in the registration application, if unaccompanied by fraud, should neither invalidate the copyright nor render the registration certificate incapable of supporting an infringement action. *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 853 (9th Cir. 2012). However, this conclusion pertains only to the extent that the work in question would still have been eligible for copyright had the registration application contained a correct statement of the facts. *See* NIMMER, *supra* note 20, § 7.20[B][1]. If the claimant willfully misstates or fails to state a fact that, if known, might have caused the Copyright Office to reject the application, then the registration may be ruled invalid. *Roberts v. Gordy*, 181 F. Supp. 3d 997, 1011 (S.D. Fla. 2016).

²⁷ *Gold Value Int'l. Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140, 1147 (9th Cir. 2019).

²⁸ *Id.* at 1142.

collection being sold to a “limited group of existing and potential customers.”²⁹ The court found against the company.³⁰ The court rejected the argument that the company was unaware that registering the same design more than once was unlawful.³¹ The court reasoned that the evidence illustrated the company’s knowledge of having previously registered the design while specifying on their copyright application that the fabric design was unpublished.³² Consequently, in addition to the Copyright Office’s denial, the court found the textile company’s application invalid, extinguishing their claim for infringement.³³

Historically, courts have held strict views toward inaccuracies included in copyright applications. Many courts looked to the dictum of the Third Circuit case *Masquerade Novelty, Inc. v. Unique Industries, Inc.* for guidance.³⁴

In *Masquerade*, a mask creator appealed a motion for summary judgment after a district court rejected the creator’s copyright suit.³⁵ The Third Circuit found in the appellant’s favor.³⁶ In dictum the court states that the “correct approach in situations where there has been a material, but inadvertent omission” is not to invalidate the copyright but instead to deprive plaintiff of the *prima facie* presumption of validity that registration otherwise conveys.”³⁷ Other district and circuit courts followed this approach.³⁸

C. Congress enacted the Safe Harbor Provision

Congress enacted a carve out in the copyright statute that superseded the approach in *Masquerade*.³⁹ In 2008, Congress drafted the Copyright Act’s safe harbor provision to combat the loophole where an application could be invalidated for trivial

²⁹ *Id.*

³⁰ *Id.* at 1148.

³¹ *Id.* at 1146 (asserting, Fiesta knowingly included previously published designs in its application to register an unpublished collection. Fiesta was aware that it had sold yards of fabric to customers prior to registering the 1461 Design as part of an unpublished collection. Although Fiesta asserts that it did not believe that such sales constituted publication as a matter of law, Fiesta provides no reasonable basis for this belief. Fiesta’s lack of authority or plausible explanation for its position distinguishes this case from others in which a claimant’s good faith or inadvertent mistake did not constitute a knowing inaccuracy).

³² *Gold Value Intl. Textile, Inc.*, 925 F.3d at 1148.

³³ *Id.*

³⁴ 2 NIMMER & NIMMER, *supra* note 20, § 7.20.

³⁵ *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 672 (3d Cir. 1990).

³⁶ *Id.*

³⁷ *Id.* at 668 (“[t]he presumption flowing from § 410(c) is not an insurmountable one, and merely shifts to the defendant the burden to prove the invalidity of the plaintiff’s copyrights.”).

³⁸ *Wilson v. Brennan*, 666 F. Supp. 2d 1242, 1252 (N.M. Dist. Ct. 2009) (finding that “[b]oth the First and Third Circuits have suggested, in dicta, that the correct approach in this situation is to deprive the party of the presumption of validity that ordinarily attaches to a registered copyright”); *see also* *Block State Testing Servs., L.P. v. Kontractor’s Prep Corp.*, 4 F. Supp. 2d 1365, 1366 (M. D. Fla. 1997) (finding that “[u]nder the copyright laws, the registration of a copyright certificate constitutes *prima facie* evidence of the validity of a copyright in a judicial proceeding.”).

³⁹ 17 U.S.C. § 411(a).

application mistakes to the benefit of copyright infringers.⁴⁰ The safe harbor provision states that a certificate of registration will not be invalidated by any inaccuracies in information unless “the inaccurate information was included on the application for copyright registration “*with knowledge*” that it was inaccurate; and the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.”⁴¹

The second leg of the safe harbor provision states that “in any case in which inaccuracy...is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.”⁴² In conjunction, these provisions create more lenient registration requirements.⁴³ Although the statute guards against unscrupulous actions, the thrust of the amendment, as stated by the Court, is to make obtaining copyright registration less difficult for non-lawyers.⁴⁴

D. The Safe Harbor Provision Has Given Rise to Dispute

The Copyright Act’s safe harbor provision has given rise to a split between circuit courts. The contention arises out of whether the safe harbor requires a showing of an intent to defraud.⁴⁵ Courts have taken different approaches on whether the safe harbor provision contains a prerequisite mental standard of fraud when the statute states

⁴⁰ 1 Raymond T. Nimmer et al., INFORMATION LAW § 2:70 (2022) (“It has also been argued in litigation that a mistake in the registration documents, such as checking the wrong box on the registration form, renders a registration invalid and thus forecloses the availability of statutory damages.”).

⁴¹ 17 U.S.C. § 411(a); *see also* Keith Kupferschmid, *Supreme Court Renders a Copyright Decision That’s Not for the Birds*, COPYRIGHT ALLIANCE (Mar. 3, 2022), <https://copyrightalliance.org/supreme-court-decision-unicolors-hm/>.

⁴² 17 U.S.C. § 411(a).

⁴³ *Id.* The statute attempts to address fraud by invalidating the registration if “the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate[.]” *Id.*

⁴⁴ The Court explained:

Those who consider legislative history will find indications that Congress enacted § 411(b) to make it easier, not more difficult, for nonlawyers to obtain valid copyright registrations...Given this history, it would make no sense if § 411(b) left copyright registrations exposed to invalidation based on applicants’ good-faith misunderstandings of the details of copyright law.

Unicolors, Inc., 142 S. Ct. at 948.

⁴⁵ *See id.* at 945. The Ninth Circuit states that “[b]oth the district court’s reasons for denying H&M judgment as a matter of law are flawed. To be sure, several opinions from this Court have implied that there is an intent-to-defraud requirement for registration invalidation.” *Unicolors, Inc.*, 959 F.3d at 1198.

that an application for copyright is invalid if inaccurate information is included “with knowledge that it was inaccurate.”⁴⁶

This contention is illustrated in two contrasting opinions. In *Roberts v. Gordy*, a musical artist appealed an unfavorable decision which found for the defendant who used the artist's lyrics and music in a dance video without consent; however, the artist's application contained inaccuracies.⁴⁷ The Eleventh Circuit found in favor of the artist.⁴⁸ The court explained that good faith inaccuracies will not invalidate a copyright application, and that “[w]hile the district court correctly found material inaccuracies in the registrations, it erred by not applying the appropriate scienter for fraud.”⁴⁹

In contrast, the Ninth Circuit disagreed. In *Gold Value*, the court found against the appellant who knowingly included inaccuracies in their copyright application.⁵⁰ The appellant argued that their copyright application should not have been invalidated void a showing of fraud.⁵¹ In rejecting the appellant's argument, the court states, “[w]e hold that [the appellant's] argument is foreclosed by the plain language of § 411(b), which does not require a showing of fraud, but only that the claimant included inaccurate information on the application “with knowledge.”⁵²

The contention of whether there is a standard of fraud reared its head yet again in the case of *Unicolors*.⁵³ The language of the safe harbor provision has been interpreted differently by both district and circuit courts.⁵⁴ The analysis by the Court in *Unicolors* is the most recent interpretation of the safe harbor.⁵⁵

Controversially, the Court's decision in *Unicolors* sees the question of fraud as “subsidiary” to the issue presented in the writ of certiorari, despite the standard of fraud being central to the lower dispute.⁵⁶ In *Unicolor*, the Court stressed the congressional intent of leniency in the copyright application process.⁵⁷ The Court's

⁴⁶ See *Unicolors, Inc.*, 142 S. Ct. at 948-50. (Thomas, J., dissenting) (“The court took this case to resolve an apparent split between the Eleventh Circuit, which has held that § 411(b)(1)(A) requires ‘deceptive intent,’ *Roberts v. Gordy*, 877 F.3d 1024, 1030 (2017), and the Ninth Circuit, which held below that ‘there is no such intent-to-defraud requirement.’”).

⁴⁷ *Roberts*, 877 F.3d at 1027 (finding that all three of the applications were found to have contained inaccuracies. The lawsuit dealt with the grant of three copyright registrations granted for a musical composition).

⁴⁸ *Id.* at 1031.

⁴⁹ *Id.* at 1030.

⁵⁰ *Gold Value Int'l. Textile, Inc.*, 925 F.3d at 1147 (finding that the applicant knowingly included information in the application when including a design that was previously registered by the applicant).

⁵¹ *Id.*

⁵² *Id.* The court derives this reasoning from the case *Lamie v. United States Treasury* where the court reasoned that “[i]t is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Id.*

⁵³ *Unicolors, Inc.*, 959 F.3d at 1195.

⁵⁴ See *id.*

⁵⁵ See generally *Unicolors, Inc.*, 142 S. Ct. 941.

⁵⁶ *Id.* at 949.

⁵⁷ *Id.* at 948 (finding that the legislative history of the statute noted that “[t]he House Report states that its purpose was to ‘improve intellectual property enforcement in the United States and abroad . . . [i]t did so in part by eliminating loopholes that might prevent enforcement of otherwise validly registered copyrights.’”).

primary concern was to close the “loophole” that is created where a copyright infringer can subvert the law by claiming a mistake in the copyright application.⁵⁸ As a result, the majority took a literal interpretation of the words “knowledge.”⁵⁹ The Court finds that the Copyright Act’s safe harbor provision contains an “actual knowledge” standard solely.⁶⁰ In short, the court eliminated the requirement of intent.⁶¹

In response to the Ninth Court’s findings, the Court simply asserts that the Ninth Circuit mistakenly invalidated the copyright for a mistake of law and remands the case.⁶² The Court reasons that safe harbor provision does not make a distinction between whether a mistake arises from a mistake of law or a mistake of fact.⁶³

The analysis in *Unicolors* has led to further confusion amongst lower courts.⁶⁴ For example, a district court in Minnesota has interpreted the *Unicolor* opinion completely differently than a district court in New York.⁶⁵ But first, before delving into the contention of the *Unicolors* opinion, it is important to take a deeper look into the case at hand to understand how the Court arrived at its conclusion.

III. THE CASE

A. Summary of the Facts

Unicolors, established in 2003, brought a civil action against the national retailer H&M, claiming that the retailer committed copyright infringement on Unicolor’s fabric

⁵⁸ See *id.*; See also Keith Kupferschmid, *Supreme Court Renders a Copyright Decision That’s Not for the Birds*, COPYRIGHT ALLIANCE (Mar. 3, 2022), <https://copyrightalliance.org/supreme-court-decision-unicolors-hm/>.

⁵⁹ *Unicolors, Inc.*, 142 S. Ct. at 946-47. The Court looked to the definition of the word “knowledge” within the Webster dictionary as a basis of their plain meaning interpretation of the appropriate standard to apply. *Id.*

⁶⁰ *Id.* at 947 (Thomas, J., dissenting) (stating that “[i]t is undisputed that Unicolors raised neither points below. It is also undisputed that there is no circuit split on either of Unicolors’ new arguments. And it is clear that the Court of Appeals did not meaningfully consider these questions. It said nothing about actual versus constructive knowledge.”).

⁶¹ See *id.* at 947.

⁶² *Id.* at 945. (stating “[i]n our view, however, § 411(b) does not distinguish between a mistake of law and a mistake of fact. Lack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration.”).

⁶³ *Id.*

⁶⁴ 1 NIMMER ET AL., *supra* note 40, § 2:70. A Minnesota district court claimed that Unicolors did not specifically address whether a showing of “fraud” was also required to invalidate a registration certificate, and since the Section 411(b) “codified the longstanding fraud on the Copyright Office doctrine” the section requires “a showing of intent-to defraud.”¹⁹ Another district court in New York disagreed, pointing to the language about no scienter requirement and concluding “Unicolors [is] clear in adopting nothing more than an actual knowledge requirement.”²⁰ This decision is on appeal.

⁶⁵ *Id.*

design EH101.⁶⁶ The company alleged that H&M infringed on a design created in 2011 by Unicolors by including the design in a collection of skirts and jackets sold by the clothing retailer in 2015.⁶⁷ At trial, the jury found that the two fabrics were “at least substantially similar.”⁶⁸

In response, H&M demurred, arguing that Unicolors had knowingly included inaccurate information in their application for copyright registration when Unicolors filed a single application to register thirty-one different fabric designs.⁶⁹ Specifically, H&M alleges that Unicolors attempted to subvert the “single unit requirement.”⁷⁰

Federal Regulations state that only a single application is needed to register a collection of works only if the works are “included in a single unit of publication.”⁷¹ H&M asserted that “the works must have been first sold or offered for sale in some integrated manner,” and that Unicolors knowingly included design EH101 in their application for copyright even though there is “undisputed” evidence that at least nine of the designs included in the application were meant to be sold “separately and exclusively to individual customers.”⁷² In short, H&M alleges that the fabric designs in question were not meant to be sold together and at the same time in satisfaction of the single unit requirement.⁷³

In addition, H&M accused Unicolors of having a history of “gaming the registration system” through exploiting the single unit rule to create countless variations of “barely original” variations that alleged infringers would have never seen nor would have access to.⁷⁴

⁶⁶ *Unicolors, Inc.*, 959 F.3d at 1196.

⁶⁷ *Id.* at 1195.

⁶⁸ *Id.*

⁶⁹ *Unicolors, Inc.*, 142 S. Ct. 942-43 (2022).

⁷⁰ *Id.*

⁷¹ *Unicolors, Inc.*, 959 F.3d at 1197-98. H&M noted that Unicolors used a single copyright registration to register thirty-one separate works, one of which was EH101. But to register a collection of works as a “single unit” as Unicolors did, H&M maintained that the works must have been first sold or offered for sale in some integrated manner. And because the undisputed evidence adduced at trial showed that Unicolors included in the '400 Registration at least nine confined works that were sold separately and exclusively to individual customers...collection of works... were not first sold together and at the same time. In turn, H&M contended the district court should find the '400 Registration invalid and enter judgment in favor of H&M. *Id.*

⁷² *Id.* at 1198. H&M attempted to persuade the court that Unicolors never intended to file the designs separately as opposed to in a single publication. *Id.*

⁷³ *Id.*

⁷⁴ 5 Bill Patry, PATRY ON COPYRIGHT § 17:125 (2007) (explaining that Unicolors is a serial copyright plaintiff with a long history of gaming the registration process. By developing countless variations, Unicolors can ensure that virtually every clothing retailer will find itself selling products with similar public-domain adaptations by designers who never saw or had access to Unicolors' works. And by registering tens of thousands of those barely original works, Unicolors can then threaten and-absent settlement-sue any such retailer for willful infringement).

B. Procedural History

Unicolors brought a civil action against H&M in 2015 for copyright infringement of their 2011 design.⁷⁵ The case went to trial and a jury awarded Unicolors \$780,774.80 in damages.⁷⁶ In an attempt to counter the verdict, H&M filed a renewed Motion for Summary Judgment.⁷⁷ In reaction, the district court rejected H&M's motion.⁷⁸

On appeal, the Ninth Circuit rejected the district court's findings.⁷⁹ The appellate court found in favor of H&M and found that the matter should be referred to the Copyright Office for further determination.⁸⁰

Consequently, Unicolors filed a Writ of Certiorari.⁸¹ In response, the Supreme Court granted the writ of certiorari and rejected the Ninth Circuit's findings, rendering a decision in favor of Unicolors.⁸²

C. Reasoning

In rejecting the national retailer's argument, the district court reasoned that under the safe harbor, invalidation of a copyright registration requires a showing of an intent to defraud the Copyright Office.⁸³ In addition, the district court reasoned that "although Unicolors may have marketed and sold various works included in the...[r]egistration separately, that did not mean all of the works were...published—on the same day."⁸⁴

The Ninth Circuit disagreed, finding the district court was incorrect on both conclusions reached for two reasons.⁸⁵ First, the appellate court found that although there were several opinions in the past that have acknowledged an intent to defraud requirement for registration invalidation, their decision in *Gold Value* forecloses the requirement of showing intent as a prerequisite to registration invalidation.⁸⁶

⁷⁵ *Unicolors, Inc.*, 959 F.3d at 1195.

⁷⁶ *Id.* at 1196.

⁷⁷ *Id.* at 1197.

⁷⁸ *Id.*; See Stephanie L. Gutwein, *Supreme Court Decides Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, FAEGRE DRINKER (Feb. 24, 2022), <https://www.faegredrinker.com/en/insights/publications/2022/2/supreme-court-decides-unicolors-inc-v-hm-hennes-mauritz-lp>.

⁷⁹ *Unicolors, Inc.*, 959 F.3d at 1197.

⁸⁰ *Id.* at 1198.

⁸¹ *Unicolors, Inc.*, 142 S. Ct. at 947.

⁸² *Id.*

⁸³ *Unicolors, Inc.*, 959 F.3d at 1198. (acknowledging that "[t]he district court held that invalidation required a showing...that Unicolors intended to defraud . . .").

⁸⁴ *Id.* at 1197 (finding that "although Unicolors may have marketed and sold various works included in the '400 Registration separately, that did not mean all of the works were not first made available to the public—i.e., published—on the same day.").

⁸⁵ *Id.* ("Both the district court's reasons for denying H&M judgment as a matter of law are flawed.").

⁸⁶ *Id.* at 1199. The court rejected the argument that there is a standard of fraud element to the safe harbor provision, the Ninth Circuit in *Gold Value* states that "[m]oreover, 'the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge

Secondly, the circuit court found that the district court erred in concluding that Unicolors did not knowingly include information within their application.⁸⁷ The circuit disagreed with the lenient reading of the “single unit” requirement and adopted a literal meaning to the phrase “a single unit of publication.”⁸⁸ The court states that a collection of work would need to be included in “some singular, bundled collection.”⁸⁹

The Ninth Circuit based its finding on evidence that Unicolors admitted to having knowledge “that certain designs included in the registration were confined and, therefore, were each published separately to exclusive customers” and not as a part of the same publication.⁹⁰ As a result, the appellate court remanded the case so that the inaccuracy may be reviewed by the Copyright Office.⁹¹

D. The Grant of Certiorari and Supreme Court's Interpretation

In reaction, Unicolors filed a writ of certiorari to the Supreme Court.⁹² On Certiorari, Unicolors controversially asked the court to answer the question: “[d]id the Ninth Circuit err . . . in holding that 17 U.S.C. § 411 requires referral to the Copyright Office where there is no indicia of fraud or material error”⁹³ The Court broadened the question, instead asking: what is the scope of the phrase “with knowledge that it was inaccurate” within the Safe Harbor Provision?⁹⁴

The Court placed emphasis on the legislative history gathered from House Report Number 110-617 that evinces that the intent was “to make it easier, not more difficult, for nonlawyers to obtain valid copyright registrations.”⁹⁵ The Court further expounded that the provision was made to close the loophole that allows infringers to exploit technicalities in the application process.⁹⁶

The Court asserted that the Ninth Circuit erroneously made a distinction between a mistake as a matter of law, and a mistake as a matter of fact.⁹⁷ The Court said that

of the law. As Justice Jackson correctly observed, ‘the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.’ *Id.*

⁸⁷ *Id.* at 1198.

⁸⁸ *Unicolors, Inc.*, 959 F.3d at 1199.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1200.

⁹¹ 17 U.S.C. § 411.

⁹² *Unicolors, Inc.*, 142 S. Ct. at 947.

⁹³ *Id.* at 950. This is a pivotal moment in the Court’s analysis. Essentially, the Court is answering a question that is not derived from an actual court contention. *Id.* By framing the question to avoid the question of fraud, the petitioner baits the Court into answering a novel question. This is the reason why Justice Thomas calls the introduction of this novel question by Unicolors “legerdemain.” *Id.* at 949.

⁹⁴ *Id.* In this instance, the court broadened the analysis even further, leading the court to an analysis that is far broader and more superfluous than needed to resolve the actual dispute. *Id.* As a result, the dispute between the circuits goes without being properly addressed.

⁹⁵ *Id.* at 947; H.R. REP. 110-617, 23.

⁹⁶ *Id.* at 948. Although this is a valid concern, the Court failed to look both ways on the issue of unscrupulous claims. *Id.* Consequently, the Court failed to acknowledge the possibility of fraud by the copyright holder. *Id.*

⁹⁷ *Unicolors, Inc.*, 142 S. Ct. at 948. The Court makes this observation although the Ninth Circuit did not actually use the phrase in their opinion. *Id.* 942-48

the provision makes no explicit distinction as to whether a mistake as a matter of fact would cause a registration to be invalidated.⁹⁸

Further, the court interpreted an “actual Knowledge” standard based on a plain text interpretation of the statute.⁹⁹ In rejecting H&M’s argument that the court’s interpretation allows unscrupulous applicants to claim lack of knowledge, the court states that “courts need not automatically accept a copyright holder’s claim that it was unaware of the relevant legal requirements.”¹⁰⁰ The Court elaborates stating, “[w]illful blindness may support a finding of actual knowledge” using circumstantial evidence to support a finding of actual knowledge, and that circumstantial evidence may include “[T]he significance of the legal error [and] the applicant’s experience with copyright law.”¹⁰¹ Ultimately, the court views the question of fraud as a “subsidiary question fairly included” which the Ninth Circuit has correctly addressed.¹⁰²

The dissent argues that the court failed to address the circuit court split regarding the issue of “whether the “knowledge” element requires “indicia of fraud,” and that Unicolors changed their position in their writ of certiorari.¹⁰³ The dissent accuses Unicolors of legerdemain by changing its question to obtain a favorable decision.¹⁰⁴ As a result, the dissent asserted that the case should have been dismissed for lack of adversarial representation, that the Court is answering a novel, and that the court is imposing the novel standard of “actual knowledge” without explaining why a constructive knowledge standard would be inappropriate despite the fact that the constructive standard is present elsewhere in the statute.¹⁰⁵

IV. ANALYSIS

Congress should write an intent to defraud standard into the Copyright Act’s safe harbor provision to correct the shortcomings of the Supreme Court’s decision and the current standard.¹⁰⁶ The Court’s analysis in *Unicolors v. H&M*, decided the wrong question of law and did not address the relevant court split.¹⁰⁷ The decision both mischaracterized the Ninth Circuit’s interpretation, and failed to scrutinize congressional intent amidst a changing landscape in the world of copyright.¹⁰⁸ In summation, the Court makes three flaws that led to its erroneous conclusion.

⁹⁸ *Id.* at 945. The Court states that “[i]n our view, however, [the safe harbor provision] does not distinguish between a mistake of law and a mistake of fact.” *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 948.

¹⁰¹ *Id.* at 949 (explaining that circumstantial evidence is the barrier for an alleged infringer to prove his case of willful blindness).

¹⁰² *Id.* The question of an intent to fraud standard is not the primary focus of the court although the dissent acknowledges that the fraud standard is why the court took the case on the petition for certiorari. *See Id.*

¹⁰³ *Unicolors, Inc.*, 142 S. Ct. at 950.

¹⁰⁴ *Id.* at 947. Justice Thomas believes that the petitioner changed his question in an effort to steer the court’s analysis in his favor. *Id.* at 950.

¹⁰⁵ *Id.* at 951.

¹⁰⁶ *Id.* at 947.

¹⁰⁷ *See id.*

¹⁰⁸ *Unicolors, Inc.*, 142 S. Ct. at 948.

First, the Court in *Unicolors* failed to address the relevant circuit court split.¹⁰⁹ Secondly, the Court affirmed a standard that is impractical and affirmed another that implies an element of intent, in contradiction to their holding.¹¹⁰ And lastly, the court failed to consider the surrounding circumstances that support H&M's allegations and as a result, undermined the copyright application process.¹¹¹

A. The Court Fails to Address the Dispute Amongst Lower Courts

To start, the opinion failed to adequately acknowledge the relevant dispute amongst various district and circuit courts.¹¹² The dispute between courts, and between the district court and the Ninth Circuit, is whether the Safe Harbor Provision of the copyright statute requires a showing of an intent to defraud when it states that an inaccuracy must be included “with knowledge” in order to invalidate an application.¹¹³

Unicolors reached the highest court to address the question of whether showing intent is a requirement within the statute, as originally posed by the district court.¹¹⁴ However, the Court finds that the question of fraud is “subsidiary” to the dispute and answers the arbitrary question of whether a mistake can render an application void where there is no indicia of fraud, completely bypassing the relevant dispute of law in favor of the dispute over the single unite requirement.¹¹⁵

¹⁰⁹ *Id.* at 950. Justice Thomas states that the court initially took the case to resolve a circuit court split about whether an intent to fraud standard was present within the safe harbor provision of the copyright statute. *Id.* The dispute in the Ninth Circuit's opinion did not deal with a mistake of law versus a mistake of fact and was not the basis of the circuit split. *Id.* at 951.

¹¹⁰ *Id.* at 948. The Supreme Court's opinion in *Unicolor*, as well as various circuit courts, has acknowledged the standard of willful blindness in the face of allegations targeting an applicant that has knowingly included an inaccuracy in their copyright application. To support a finding of willful blindness, the court will look to the surrounding facts of a case to evaluate whether an allegation of willful blindness can prevail. *Id.* The court further expounds on a non-exhaustive list of factors that are considered when looking at circumstantial evidence. *Id.*

¹¹¹ 17 U.S.C. § 411(b)(1). Section (1) and (2) of the safe harbor provision lays out a two-part test to determine whether an application should be invalidated due to the inclusion of an inaccuracy. *Id.* The first part of the test asks whether the inaccuracy in the application was included with knowledge. *Id.* The second part of the test looks to see if the Copyright Office would deny the application for registration had the inaccuracy been known by the Copyright Office. *Id.*

¹¹² *Unicolors, Inc.*, 142 S. Ct. at 949. Near the end of the opinion, the Court responded to the question of fraud in this case as “subsidiary” and asserted that the Ninth Circuit court had already answered this question correctly when it found that there was no intent to defraud standard present within the statute. *Id.* at 950.

¹¹³ *Unicolors, Inc.*, 959 F.3d at 1198. The Ninth Circuit found that the district court's reasoning was flawed for two reasons. The first reason was that the district court read an intent to defraud into the safe harbor provision. The court stated that its decision in *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing*, clarified this alleged misconception. Secondly, the court found the application contained inaccuracies, contrasting the opinion of the district court. *Id.*

¹¹⁴ *Id.* at 1197.

¹¹⁵ *Unicolors, Inc.*, 142 S. Ct. at 948.

When viewed in the context of the surrounding facts, the contention of whether a requirement of intent is present within the provision is the central disagreement between the circuit courts, and not a “subsidiary” dispute.¹¹⁶ The question of whether a mistake of law or mistake of fact can invalidate a copyright is a novel question posed by the court itself, which the statute already answers.¹¹⁷

The dissent pointed to the Eleventh Circuit decision, *Roberts v. Gordy*, which was the focus of the apparent court split.¹¹⁸ *Roberts* made no contentions about whether a mistake of law versus a mistake of fact can invalidate a copyright decision.¹¹⁹ As a result, Justice Thomas correctly asserted that the petition for certiorari should be dismissed for lack of “adversarial representation” and that the Supreme Court cannot be “be the first court in the [n]ation” to decide a novel issue.¹²⁰

The Ninth court found that Unicors failed the first of two elements within the Safe Harbor Provision and referred to the matter to the Copyright Office.¹²¹ The Court in *Unicors* disregards these facts, finding any issue of intent and fraud as a footnote to the dispute, while acknowledging the viability of the Willful Blindness doctrine.¹²²

Critics may argue that the Supreme Court was clear in its decision in saying that only an actual knowledge standard aligns with congressional intent. Foreseeably, this dispute continues even after the *Unicors* decision has been rendered, highlighting this opinion’s nebulous analysis.

¹¹⁶ *Id.* at 950. Justice Thomas acknowledges that *Roberts v. Gordy* is the case that gave rise to disagreement between circuit courts. In *Robert*, the Eleventh Circuit court found that the district court “improperly invalidated artists’ copyright registrations by not applying the appropriate scienter for fraud standard.” *Id.*

¹¹⁷ *See Unicors, Inc.*, 959 F.3d at 1196. The Ninth Circuit never used the term “mistake of law or mistake of fact.” *See id.* at 1196 -1201. The Ninth Circuit’s contention is that district court found that Unicors application did not contain an inaccuracy. *Id.* at 1198. The circuit court elaborates that Unicors’s mistake violated the “single publication” requirement by including a design that was not intended to be published at the same time as the other designs. This was contrary to the district courts finding that the application did not necessarily contain an inaccuracy because the pre-sale of the design prior to publication does not violate the copyright statutes requirements. *Id.* at 1198. The Ninth Circuit simply finds that there was a mistake in Unicors’s copyright application and that the matter should be referred to the copyright Office. *Id.* at 1201.

¹¹⁸ *Unicors, Inc.*, 142 S. Ct. at 950; *see also Roberts*, 877 F.3d at 1030 (finding that a standard of fraud is present within the copyright Safe Harbor Provision).

¹¹⁹ This case dealt with whether a showing of fraud is necessary to invalidate an application, i.e., whether the Safe Harbor Provision contains a standard of fraud. *Roberts*, 877 F.3d at 1030. This Eleventh Circuit never mentioned whether an application can be invalidated for a “mistake of law” versus a “mistake of fact.” *Id.*

¹²⁰ *See generally City and Cnty of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *see also Unicors, Inc.*, 142 S. Ct. at 949-50 (Thomas, J., dissenting) (“In *Sheehan*, we granted review to resolve a Circuit split and decide whether the Americans with Disabilities Act requires law enforcement officers to provide reasonable accommodations to armed, violent, and mentally ill criminals while arresting them...But after the petitioners’ opening brief ‘effectively concede[d]’ that it may and pressed a narrower, ‘qualified’ version of the original argument...we dismissed the case for lack of ‘adversary presentation’ of the question presented[.]”).

¹²¹ *Unicors, Inc.*, 959 F.3d at 1198 (finding that Unicors knowingly included inaccurate information in their copyright application for a fabric design).

¹²² *Unicors, Inc.*, 142 S. Ct. at 949.

A district court in Minnesota found that the statute contains a requirement of an intent to defraud because the Supreme Court did not specifically address the question of the presence of an intent to defraud requirement.¹²³ In contrast, a district court in New York has found that *Unicolors* has clearly rejected a scienter of fraud approach.¹²⁴ This dispute amongst the lower courts highlights the shortcomings of the *Unicolors* opinion.

B. The Willful Blindness Doctrine Affirms the Idea that the Safe Harbor Provision Requires a Showing of Intent, Making the Decision Unclear

Notably, although the Court rejected a standard of intent, the Court acknowledge the doctrine of willful blindness.¹²⁵ The Court in *Unicolors* affirms this notion stating that “courts need not automatically accept a copyright holder's claim . . . willful blindness may support a finding of actual knowledge.”¹²⁶ This doctrine is not explicitly within the safe harbor provision.¹²⁷

The Court's acknowledgment of a “willful blindness” standard is contradictory amidst their rejection of a standard of intent. The willful blindness standard inherently scrutinizes an applicant's *intent* to remain intentionally, or *willfully*, ignorant, in a scenario where the party surreptitiously fails to exercise due diligence in knowing the law in an effort to deceive the copyright office.¹²⁸ Willful blindness reinforces the requirement of intent as it is a test centered around an applicant's intentional conduct in order to prove the applicant was purposefully ignorant of the applicable law. The factors test present in the willful blindness standard calls for an inquiry into intent by evaluating a party's experience with copyright law, and the significance of legal error, amongst other factors.¹²⁹

Indeed, it can be argued that an actual knowledge standard is more in alignment with a plain text interpretation of the safe harbor provision's language of “with knowledge.”¹³⁰ Particularly when viewed in conjunction with the words “with knowledge” within the safe harbor provision and congressional intent.¹³¹ However, the issue with the standard lies in its application; in short, an actual knowledge standard is impractical. The actual knowledge standard creates a steep evidentiary burden since a defendant has to prove an applicant remained idle, as opposed to proving intent. How an accused infringer would go about proving the accusing party remained willfully ignorant of the law would be overly burdensome without being able to use evidence of intent to prove the applicant did virtually nothing to learn the law, willfully. It begs the question: how can one remain idle unintentionally? Particularly when dealing with more sophisticated applicants.

¹²³ 1 NIMMER ET AL., *supra* note 40, § 2:70 (see comments).

¹²⁴ *Id.*

¹²⁵ *Unicolors, Inc.*, 142 S. Ct. at 949; see also Gutwein, *supra* note 78.

¹²⁶ *Unicolors, Inc.*, 142 S. Ct. at 949.

¹²⁷ *Id.*

¹²⁸ *Unicolors, Inc.*, 959 F.3d at 1198.

¹²⁹ *Unicolors, Inc.*, 142 S. Ct. at 948.

¹³⁰ 17 U.S.C. § 411(b)(1).

¹³¹ 5 PATRY, *supra* note 74, § 17:125.

Consequently, the willful blindness standard affirms a requirement of intent. With intent being the underlying focus of the willful blindness doctrine, the Court is rejecting the element of intent while impliedly affirming the element of intent.¹³² This muddies the clarity of the Court's opinion.

*C. The Court Fails to Consider Material Circumstantial Evidence and thus,
Undermines the Copyright Application Process*

In the alternative, even if there is no requirement of fraud, the Court in *Unicolors* fails to consider surrounding circumstantial evidence.¹³³ The Court fails to appreciate the underlying facts of the case, particularly when addressing H&M's assertion that the Willful Blindness doctrine is too lenient.¹³⁴

In response to the assertion, the Majority acknowledges that courts may look at circumstantial evidence to prove knowledge.¹³⁵ One may argue that the underlying facts of *Unicolors* were of no legal significance and that H&M is simply posing a routine legal counter argument targeting Unicolor's credibility. However, this view, along with the Supreme Court's view, fails to appreciate the parallels in this case to *Gold Value*, where the Ninth Circuit rejected the plaintiff's pleas that he lacked knowledge of his copyright application because the court found that there was evidence to support a finding to the contrary.¹³⁶

The facts in the present case and *Gold Value* bear striking resemblances.¹³⁷ In *Gold Value*, the plaintiff attempted to register thirty-three fabric designs with one single application, much like Unicolors attempted to register thirty-one designs with one copyright application.¹³⁸ However, in *Gold Value*, the court found that the company claiming infringement knowingly included incorrect information in their copyright application.¹³⁹ The court in *Gold Value* found that the company was aware that some of the designs included in the application had been included in previous publications, thus failing to comply with the "single publication" requirement of the statute.¹⁴⁰

¹³² *Unicolors, Inc.*, 142 S. Ct. at 949.

¹³³ *Id.* at 948.

¹³⁴ *Id.* (H&M asserts the policy argument that the majority's interpretation of the statute will allow for fraudulent claims of willful blindness).

¹³⁵ *Id.*

¹³⁶ *Gold Value Int'l. Textile, Inc.*, 925 F.3d at 1144.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1147 ("The plaintiff in *Gold Value* was also a textile design company like Unicolor. The court states Unlike the plaintiff in *L.A. Printex Fiesta* knowingly included previously published designs in its application to register an unpublished collection. Fiesta was aware that it had sold yards of fabric to customers prior to registering the 1461 Design as part of an unpublished collection. Although Fiesta asserts that it did not believe that such sales constituted publication as a matter of law, Fiesta provides no reasonable basis for this belief. Fiesta's lack of authority or plausible explanation for its position distinguishes this case from others in which a claimant's good faith or inadvertent mistake did not constitute a knowing inaccuracy.").

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Similarly, H&M asserts that there is evidence that Unicolors did not intend to include all thirty-one designs within on single publication.¹⁴¹ H&M alleges that there is evidence that there were “at least nine confined works that were sold separately and exclusively to individual customers, and thus, were not intended to be sold in a “single publication,” as required by the copyright statute.¹⁴² The similarities of these facts should have been enough to warrant a more thorough scrutiny.¹⁴³

Unfortunately, the Court in *Unicolors* overlooked these similarities in circumstantial evidence and barrenly asserted that circumstantial evidence can include the “*significance of the legal error [and] the applicant's experience with copyright law.*”¹⁴⁴ Ostensibly, the court failed to consider facts that support these factors. The Court overlooked the fact that Unicolors is a company founded in 2003, that Unicolors has extensive experience with copyright applications being a textile company, and that the significance of the legal error cannot be mischaracterized as a small error when failing to register thirty-one designs.¹⁴⁵ The Court also fails to look into the alleged history of copyright misconduct claimed by H&M where Unicolors has subverted the “single publication” rule.¹⁴⁶ In total, the Court’s failure to consider the similarities in this case to *Gold Value*, as well as their failure to consider the presence of material circumstantial evidence, weakens the Court’s analysis.¹⁴⁷

In addition, the court’s decision undermines the Copyright Office’s role in the copyright application. The second leg of the Safe Harbor Provision test is dependent on the first, and thus, a court’s failure to adequately consider circumstantial evidence in the face of meritorious allegations stifles the efficacy of the statute.¹⁴⁸

V. CONCLUSION

In sum, Congress should amend the language of the safe harbor provision, effectively overturning the decision in *Unicolors*.¹⁴⁹ When digested with the underlying

¹⁴¹ *Unicolors, Inc.*, 959 F.3d at 1198 (explaining that H&M has consistently argued that there is evidence of willful blindness present in this dispute but to no avail. Only the Ninth Circuit held in favor of H&M).

¹⁴² *Id.* at 1198.

¹⁴³ *Gold Value Int’l. Textile, Inc.*, 925 F.3d at 1144 (finding that the company knowingly included inaccuracies in their application by including previously registered textile designs in application).

¹⁴⁴ *Unicolors, Inc.*, 142 S. Ct. at 948 (acknowledging several factors that are scrutinized when evaluating whether circumstantial evidence may support a finding of willful blindness).

¹⁴⁵ In length, the Court lists a number of factors to be considered when reviewing circumstantial evidence. The Court states that “[c]ircumstantial evidence, including the significance of the legal error, the complexity of the relevant rule, the applicant’s experience with copyright law, and other such matters, may also lead a court to find that an applicant was actually aware of, or willfully blind to, legally inaccurate information.” *Unicolors, Inc.*, 142 S. Ct. at 948

¹⁴⁶ 5 PATRY, *supra* note 74, § 17:125.

¹⁴⁷ *Gold Value Int’l. Textile, Inc.*, 925 F.3d at 1142.

¹⁴⁸ *Unicolors, Inc.*, 142 S. Ct. at 948.

¹⁴⁹ *Id.*

facts of the case, the decision proves insufficient.¹⁵⁰ The majority's opinion fails to make several key observations and as a result, the opinion fails to resolve the dispute amongst the lower courts.¹⁵¹

In addition, the Court acknowledged the viability of the willful blindness doctrine which impliedly requires an element of intent, making the standard unclear.¹⁵² The disagreement among the circuit courts dealt with whether an invalidation of a copyright claim required a showing of an intent to fraud.¹⁵³ Instead, the Court sidestepped this question amidst critical circumstantial evidence.¹⁵⁴ These conclusions are erroneous in the face of the underlying dispute and make the law unclear.¹⁵⁵

Secondly, in the face of consistent allegations by H&M, the Court did not scrutinize the underlying facts of this case that could possibly support an allegation of willful blindness and remanded the case back to the lower court to apply an actual knowledge standard.¹⁵⁶ H&M argued that there were facts that supported a finding of willful blindness on behalf of Unicolors, with the Ninth Circuit finding in H&M's favor.¹⁵⁷ Unfortunately, the Court in *Unicolors* overlooked the meritorious allegations and the controversial underlying facts.¹⁵⁸

Lastly, the Court's failure to consider circumstantial facts demeans the copyright application process.¹⁵⁹ The second leg of the safe harbor provision depends on the first, where it is the court's job to adequately address the possibility of an applicant knowingly including inaccurate information.¹⁶⁰ Because the court failed to scrutinize the circumstances of the case, the Court extracts the Copyright's Offices role in determining whether Unicolors application is valid or not.¹⁶¹

For the foregoing reasons, Congress should amend the statute to require an element of intent to invalidate an application for inaccuracies, thus, overturning the ruling in *Unicolors*. This case has left the lower courts vexed as lower courts have

¹⁵⁰ *Id.* The Court in *Unicolors* fails to appreciate the circumstances leading up to the petition for certiorari. *Id.* In doing so, the Court fails to consider the case in its totality and overlooks the underlying circuit split about the real issue: whether there is an intent to fraud standard present within the safe harbor provision. *Id.* at 949.

¹⁵¹ *Id.* at 948.

¹⁵² *Id.* at 949.

¹⁵³ *Unicolors, Inc.*, 142 S. Ct. at 948.

¹⁵⁴ *Id.* The majority states that "[i]n our view, however, § 411(b) does not distinguish between a mistake of law and a mistake of fact. Lack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration." *Id.* at 945.

¹⁵⁵ *See id.*

¹⁵⁶ *Unicolors, Inc.*, 959 F.3d at 1198; *see also Unicolors, Inc.*, 142 S. Ct. at 949 (remanding the case back down to the lower court to render a decision consistent with the new opinion.).

¹⁵⁷ The Ninth Circuit found that Unicolors had failed to comply with the single unit requirement in contract to the lower court. *Unicolors, Inc.*, 959 F.3d at 1198.

¹⁵⁸ *Id.*

¹⁵⁹ *See* 17 U.S.C. § 411(b).

¹⁶⁰ *Id.* ("A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless--the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and, the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.").

¹⁶¹ *See id.*

reached different determinations following the *Unicolors* decision.¹⁶² As the highest court in the land, lower courts look to this Court for guidance in resolving questions of law. When the Supreme Court renders a decision that is unclear, it leads to disarray amongst the lower court; continued disarray of the lower courts will only lead to a lack of uniformity in American copyright application enforcement for years to come.

¹⁶² *FurnitureDealer.Net, Inc v. Amazon.com, Inc.*, No. 18-232 (JRT/HB), 2022 WL 891473, at *13 (D. Minn. Mar. 25, 2022); *Lieb v. Korangy Publishing, Inc.*, No. CV 15-0040 (AYS), 2022 WL 1124850, at *12 (E.D. N.Y. 2022); *Neman Bros. & Assoc., Inc. v. Interfocus, Inc.*, No. 2:20-cv-11181-CAS-JPRx, 2023 WL 115558, at *9 (C.D. Cal. Jan. 4, 2023); *Brunson v. Cook*, No. 3:20-cv-01056, 2023 WL 2668498, at *15 (M.D. Tenn. Mar. 28, 2023).

