



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 12, 2024

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Valancourt Books, LLC v. Garland*, No. 21-5203 (D.C. Cir. 2023)

Dear Speaker Johnson:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek Supreme Court review of the above-referenced decision of the United States Court of Appeals for the District of Columbia Circuit. A copy of the decision is attached.

This case concerns a longstanding statutory requirement that an owner of copyright in a published work must deposit two copies of the work with the Copyright Office for the use or disposition of the Library of Congress. 17 U.S.C. 407. The Section 407 deposit requirement for published works is separate from, but complementary to, the deposit requirement that 17 U.S.C. 408 imposes on applicants for copyright registration. Copyright owners who deposit copies pursuant to Section 408 generally satisfy their Section 407 obligations as well, but not all copyright owners seek to register their works.

As amended in 1988, Section 407 of Title 17 states that, except as exempted by the Register of Copyrights, “the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication * * * two complete copies of the best edition” of the work with the Copyright Office “for the use or disposition of the Library of Congress.” 17 U.S.C. 407(a)-(b). If a copyright owner or publisher does not deposit copies of a work after publication (and if suitable copies have not otherwise been delivered to the Office through registration), the Copyright Office may make a written demand for the deposit upon the publisher or the copyright owner. If a demand has been made, the copyright owner or publisher has three months to comply before it is subject to fines and costs for the Library to purchase the work. 17 U.S.C. 407(d).

Valancourt Books, a publisher of rare and out-of-print fiction, filed a suit alleging that the requirement to deposit copies of newly published copyrightable works is an unconstitutional

taking of private property under the Just Compensation Clause of the Fifth Amendment and a burden on freedom of speech in violation of the First Amendment. The district court rejected Valancourt's arguments and granted summary judgment for the government. The court held that Section 407's deposit requirement does not run afoul of the Constitution because it is a condition on the statutory benefits conferred by the Copyright Act.

The D.C. Circuit reversed. The court held that, as applied to Valancourt in this case, Section 407's mandatory deposit requirement violates the Just Compensation Clause because it allows "the government [to] directly appropriate[] private property for its own use." Op. 13 (quoting *Tyler v. Hennepin Cty.*, 143 S. Ct. 1369, 1376 (2023)). The court held that the deposit requirement does not represent a "voluntary exchange for a government benefit," Op. 14, because, under the Copyright Act, an author can acquire copyright protection automatically by fixing the work in a tangible medium of expression, Op. 15. The court rejected the government's argument that the mandatory deposit requirement was permissible because Valancourt could have "disavow[ed] copyright protection and thereby avoid[ed] the deposit requirement." Op. 20. The court explained that Valancourt had not been informed of its ability to abandon copyright before it filed suit, Op. 22, and the court found it unclear whether any cost-free method of abandonment exists, Op. 23-24. The court's decision addressed only the Copyright Office's demand for physical copies of books from Valancourt and expressly disclaimed any holding as to electronic copies. See Op. 11-12.

The court of appeals emphasized that its constitutional holding was limited to the Copyright Office's application of the deposit requirement to the circumstances of this case. See Op. 13, 27, 28. Because the court found that the application to Valancourt of the mandatory deposit requirement violated the Just Compensation Clause, it did not address Valancourt's First Amendment claim. The court subsequently denied the government's petition for rehearing en banc.

Although the Department of Justice disagrees with the D.C. Circuit's decision, that decision does not squarely conflict with any decision of the Supreme Court or another court of appeals. The significance of the decision is also limited. The D.C. Circuit held only that Section 407's deposit requirement is unconstitutional as applied to the plaintiff in this litigation, and it left open the possibility that Section 407 may be constitutionally applied to other persons subject to the deposit requirement. And as noted above, this decision does not affect the deposit requirement that 17 U.S.C. 408 imposes on applicants for copyright registration.

In particular, the D.C. Circuit's decision does not disturb the Copyright Office's practices with respect to persons who have acquired exclusive publication rights in copyrighted works. Currently, the majority of Section 407 demands are sent to publishers that have contracted with copyright owners for the exclusive right to publish their copyrighted works. Those publishers are subject to the deposit requirement not simply because of the creation of the copyrighted work, or its fixation in a tangible medium of expression, but because of their own deliberate choice to obtain the benefits of copyright provided by Title 17.

With respect to circumstances where copyright in particular works was not obtained through voluntary commercial transactions, the Copyright Office can continue to implement

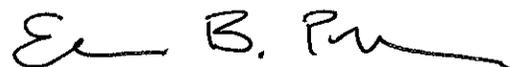
Section 407 by modifying the Office's practices in a manner that will avoid the concerns identified by the D.C. Circuit while still effectuating Section 407's goal of supporting the Library of Congress's collections. The Copyright Office intends to offer copyright owners and publishers the option to provide deposits in electronic form. Entities subject to the mandatory deposit requirement therefore will be able to comply without incurring the costs associated with the creation and shipment of physical copies. The Copyright Office will also offer compliance flexibility to any copyright owners and publishers that raise other hardship concerns.

Finally, the Copyright Office intends to modify the language of its deposit demand letters. The Office will provide all recipients with information regarding the benefits of copyright protection and the Library's desire to include the requested work in the national collection. The demand letters will further explain, however, that the deposit requirement applies only to persons who choose to retain the benefits of copyright protection. If a recipient notifies the Copyright Office that it does not wish to retain copyright protection in a work that is the subject of a demand letter, the Office will engage in correspondence with the recipient, and it will direct recipients who have questions to public resources that discuss cost-free steps to abandon a copyright. The Copyright Office will withdraw its demand for copies if the recipient provides the Office with information reflecting the recipient's abandonment of its copyright. The D.C. Circuit in this case specifically reserved the question "whether a known and costless abandonment option would make Section 407 constitutional." Op. 21.

Under the circumstances, and in light of the planned alterations to the Copyright Office's practices, the Department of Justice has determined not to seek Supreme Court review of the D.C. Circuit's decision.

A petition for a writ of certiorari in this case would be due on May 10, 2024. Please let me know if we can be of any further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "E. B. Prelogar". The signature is fluid and cursive, with a long horizontal stroke at the end.

Elizabeth B. Prelogar
Solicitor General

Enclosure