

No. 22-1078

IN THE
Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC., ET AL.,
Petitioners,

v.

SHERMAN NEALY, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF FOR *AMICUS CURIAE*
ASSOCIATION OF AMERICAN PUBLISHERS
IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST¹

Amicus Curiae the Association of American Publishers, Inc. (“AAP”) represents book, journal, and education publishers in the United States on matters of law and policy, including major commercial houses, small and independent houses, and university presses and other noncommercial scholarly publishers. AAP seeks to promote an effective and enforceable framework that enables publishers to create and disseminate a wide array of original works of authorship to the public on behalf of their authors and in furtherance of informed speech and public progress.

AAP submits this brief in support of Petitioners and urges this Court to adopt the so-called “injury” rule in applying the statute of limitations in copyright infringement cases or, at a minimum, to endorse the ruling of the Second Circuit in *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020), and hold that a copyright plaintiff may be entitled to retrospective relief for, “three years, and only three years” from the date of filing, so that “the infringer is insulated from liability for earlier infringements of the same work.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).

SUMMARY OF ARGUMENT

Copyright is the foundation and lifeblood of the publishing industry. AAP’s members highly respect copyright, as both copyright owners and licensees of material owned by others. In some instances, publishers’ books, journals, and other works are infringed by others, requiring them to be on the plaintiff’s side of

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

copyright litigation. In other instances, despite good faith licensing practices, AAP's members are defendants in cases brought by other copyright owners. Accordingly, they can be—and are—on either side of infringement claims.

An open-ended statute of limitations might sometimes benefit AAP's members, but this potential advantage is overridden by the need for consistency and predictability in copyright law, particularly in light of the recent spate of lawsuits brought against publishers and attendant difficulties in defending what are sometimes hundreds of claims of infringing uses spanning decades. Frequently, records, including original licenses for these uses, have been lost to time as imprints have been acquired, witnesses have left and financial information required to contextualize profits has been discarded, leaving publishers largely unable to defend themselves.

Permitting plaintiffs to bring claims based on alleged infringements dating back dozens of years runs contrary to the very purpose of a statute of limitations, which is to “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Gabelli v. SEC*, 568 U.S. 442 (2013) (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). This result also is contrary to the plain meaning of Section 507(b) of the Copyright Act, which states that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). And it contradicts this Court's holdings that where a statute of limitations does not otherwise specify, courts should favor an “injury” rather than

“discovery” rule. Indeed, in reviewing the very statute of limitations at issue here, this Court found that a claim “accrues” when an infringing act occurs and that the Copyright Act’s three-year limitations provision “allows plaintiffs . . . to gain retrospective relief running *only three years back* from the date the complaint was filed.” *Petrella*, 572 U.S. at 672 (emphasis added).

The holding of the Eleventh Circuit in this case and similar holdings in other circuits that have coupled application of the discovery rule with an indefinite damages lookback period² creates an ironic and untenable situation. It rewards the indolent or indifferent plaintiff (*i.e.*, one that did not monitor the use of its materials or take prompt action to enforce its rights) by permitting such plaintiff to seek damages dating back many years while at the same time limiting a diligent copyright holder to damages for injuries that occurred over three years prior to the commencement of an infringement action.

AAP urges this Court to hold that the injury rule governs application of the statute of limitations in copyright cases. At an absolute minimum, if the discovery rule is to be maintained, the remedy for a prevailing plaintiff should be limited to prospective relief coupled with damages going back no further than three years from the date the copyright claim was filed.

² See, e.g., *Starz Ent. LLC, v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1244-46 (9th Cir. 2022).

ARGUMENT

I. Application of the Discovery Rule Along With an Indefinite Period for Retroactive Damages Presents a Significant Concern for AAP's Members

It may not be obvious that AAP, which is an organization that represents copyright holders, would seek to limit the statute of limitations for copyright claims. The explanation is in the way that the discovery rule along with an unlimited lookback on damages has been exploited by copyright plaintiffs.

Over the past two decades, publishers and other distributors of content have faced hundreds of copyright cases brought by photographers and other copyright owners claiming that the defendant publishers had exceeded the scope of licenses, typically licenses for photographs appearing in AAP members' books or other publications.³ The original price point for these

³ See, e.g., *Bean v. Houghton Mifflin Harcourt Publ'g Co.*, 3:07-cv-08063-JAT (D. Ariz.), Filed: 07/26/2007; *Bean v. Houghton Mifflin Harcourt Publ'g Co.*, 3:10-cv-08034-DGC (D. Ariz.), Filed: 02/22/2010; *Clifton v. Houghton Mifflin Harcourt Publ'g Co.*, 3:15-cv-03985-LB (N.D. Cal.), Filed: 09/01/2015; *Degginger v. Houghton Mifflin Harcourt Publ'g Co.*, 2:10-cv-03069-JF (E.D. Pa.), Filed: 06/24/2010; *Bean v. John Wiley & Sons Inc.*, 3:11-cv-08028-FJM (D. Ariz.), Filed: 02/23/2011; *Bean v. John Wiley & Sons Inc.*, 3:12-cv-08001-GMS (D. Ariz.), Filed: 01/04/2012; *Clifton v. John Wiley & Sons, Inc.*, 4:13-cv-02923-JSW (N.D. Cal.), Filed: 06/25/2013; *Degginger v. John Wiley & Sons, Inc.*, 2:11-cv-06600-CDJ (E.D. Pa.), Filed: 10/21/2011; *Clifton v. Macmillan Publishers Ltd.*, 3:13-cv-02291-JST (N.D. Cal.), Filed: 05/20/2013; *Clifton v. McGraw-Hill School Educ. Holdings, LLC*, 5:15-cv-01672-HRL (N.D. Cal.), Filed: 04/13/2015; *Degginger v. McGraw-Hill Global Educ. Holdings LLC*, 4:14-cv-02429-DCB-DTF (D. Ariz.), Filed: 10/21/2014; *Steinmetz v. McGraw-Hill Global Educ. Holdings, LLC*, 2:15-cv-06600-ER (E. D. Pa.), Filed: 12/14/2015; *Bean v.*

licenses usually was low, often somewhere between \$50 and \$200. *See Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 676 (9th Cir. 2014) (noting, in photographer infringement case, that “[p]urchasers buy permission from the stock agency to use particular pictures, usually for a limited number of copies, with the prices varying from less than a dollar to perhaps a couple of hundred dollars.”). Very often the price was set based on “rate cards” or “preferred vendor agreements” agreed to by the photographer or its licensing agent and the publisher (*see Sohm v. Scholastic Inc.*, No. 16-CV-7098 (JPO), 2018 WL 1605214, at *1 (S.D.N.Y. Mar. 29, 2018), *aff'd in part, rev'd in part and remanded*, 959 F.3d 39 (2d Cir. 2020) (describing “preferred vendor agreement” that set prices for use of photographs)), and the license price was calculated based on factors that included the number of copies to be printed or distributed, medium of use, and geographic scope. *See Pac. Stock, Inc. v. Pearson Educ., Inc.*, No. CIV. 11-00423 SOM, 2012 WL 93182, at *1 (D. Haw. Jan. 11, 2012) (identifying common limitations in licenses). In most cases, a license to print more copies or to permit additional uses would have cost only a few dollars more.

In a typical instance, the plaintiffs, who are typically either the photographer or a licensing agent, allege, on information and belief, numerous acts of copyright infringement—in the worst cases, thousands of uses

Pearson Educ. Inc., 3:11-cv-08030-GMS (D. Ariz.), Filed: 02/25/2011; *Clifton v. Pearson Educ., Inc.*, 5:11-cv-03640-EJD (N.D. Cal.), Filed: 07/25/2011; *Degginger v. Pearson Educ., Inc.*, 2:11-cv-01302-GEKP (E.D. Pa.), Filed: 02/24/2011; *Yamashita v. Scholastic, Inc.* 1:2016-cv-09201-KBF (S.D.N.Y.), Filed: 11/29/2016; *Bob Daemmrigh Photography, Inc. v. Scholastic Inc.*, 1:2015-cv-01150-RP (W.D. Tex.), Filed 12/11/2015.

(see, e.g., *Frerck v. Pearson Educ., Inc.*, 63 F. Supp. 3d 882 (N.D. Ill. 2014) (3,582 uses); *Grant Heilman Photography, Inc. v. McGraw-Hill Cos., Inc.*, 28 F. Supp. 3d 399 (E.D. Pa. 2014) (2,395 uses); *DRK Photo v. McGraw-Hill Cos., Inc.*, No. CV 12-08093-PCT-PGR, 2013 WL 1151497 (D. Ariz. Mar. 19, 2013) (1,120 uses))—based solely on the fact that photographs had been licensed by a publisher and the bare allegation that each was used beyond the scope of the license. See *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 101 (2d Cir. 2019) (affirming dismissal of complaint where plaintiff pled “[u]pon information and belief” that ‘the licenses granted [defendant] were expressly limited by number of copies, distribution area, language, duration, and/or media’ . . . [defendant] ‘exceeded the licenses’ that it purchased, [plaintiff] alleged, and ‘infringed [plaintiff’s] copyrights in the Photographs in various ways”). More than that, the licenses at issue often are ten or twenty years old and had been entered into by entities or imprints that were later acquired by the defendant publisher (see *Palmer Kane LLC v. Scholastic Corp.*, No. 12 CV 3890, 2013 WL 709276, at *1 (S.D.N.Y. Feb. 27, 2013) (including uses made by imprints acquired by defendant over a decade before)), where records have likely been lost to time. See, e.g., *Frerck*, 63 F. Supp. 3d 882 (identifying uses back to 1992); *DRK*, 2013 WL 1151497 (identifying uses back to 1992 in a complaint filed in 2011).

Publishers defending these claims have been faced with a difficult and often insurmountable burden. Changes in their business structures, acquisitions and realignments, outdated record-keeping practices and the passage of time often means that the defendant cannot find a copy of the original license or obtain a full understanding of how the licensed photograph or other material was used. Indeed, at times, it has been

impossible to find even a copy of the publication at issue. *Cf. Sohm*, 2018 WL 1605214, at *8-9 (dismissing claims on summary judgment where, following discovery, there was no evidence that seven of the allegedly infringed photographs had been used at all). Witnesses involved in the negotiation and acquisition of a license may no longer be working at the defendant entity, not available to either party and/or may have no recollection of the specific licenses and uses at issue. In addition, business records that might have been used to show deductible expenses and elements of profits from factors other than the use of the copyrighted work may have been lost (*see, e.g., On Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001) (Leval, J.)), leaving publishers without the ability to limit damage exposure on cases resulting from licenses that originally cost \$200 or less.

Plaintiffs have used the difficulties faced by publishers and other defendants to seek damages that exceed, by many multiples, the lost license fee or the actual advantage to the publisher gained from the use of the copyrighted work.⁴ They know that if they can get by the pleading stage, they can force a defendant to engage in what surely will be extensive and expensive discovery, as the defendant looks for information relating to the license, use, sale, revenue and profits from each of what often is a large number of claimed

⁴ The potential availability of statutory damages also encourages plaintiffs to demand large damage awards or settlements. Pursuant to section 504(c)(1)-(2) of the Copyright Act, 17 U.S.C. § 504, a prevailing plaintiff can seek up to \$30,000 for each (registered) copyrighted work infringed, and up to \$150,000 if the infringement is found by the trier of fact to be “willful.” Again, the absence of documents and of witnesses makes defending against plaintiff’s showing of alleged willfulness very difficult.

infringements. They also know that many defendants will choose to settle, rather than go through discovery, motion practice and trial.

II. Defendants Rarely Will be Able to Prove That a Plaintiff Knew or Should Have Known About an Infringement Without Going Through Extensive Discovery and a Trial

While the discovery rule provides a theoretical defense for defendants in cases with uses that are more than three years old, in practical terms this “defense” is illusory. First, it is nearly impossible for a publisher to prevail on a statute of limitations defense at the pleading stage, where a plaintiff need do little more than claim that the infringement was recently discovered. *See PK Music Performance, Inc. v. Timberlake*, No. 16-CV-1215 (VSB), 2018 WL 4759737, at *7 (S.D.N.Y. Sept. 30, 2018) (citing *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989)) (instructing, in a copyright case, that “where there is even ‘some doubt’ as to whether dismissal is warranted, a court should not grant a Rule 12(b)(6) motion on statute of limitations grounds”); *see also Hirsch v. Rehs Galleries, Inc.*, No. 18-cv-11864, 2020 WL 917213, at *5 (S.D.N.Y. Feb. 26, 2020) (denying a motion to dismiss and noting that the fact that the plaintiff retained a law firm that specializes in searching for infringing conduct is not enough to put plaintiff on notice). Publishers are thus required to defend the litigation through discovery and at least until the summary judgment stage, at considerable cost.

Even at the summary judgment stage, it is extremely difficult for a publisher or other defendant to prevail. Because the statutory provision—unsurprisingly, as it instead suggests the injury rule for the reasons noted below—provides no clarity on what “discovery” means

or how it should be measured, courts have applied different language and different tests to determine whether the plaintiff should be precluded from continuing its lawsuit. Many courts have stated that a claim is discovered when the plaintiff “knew or should have known” of its claim. *Starz Ent., LLC v. MGM Domestic Telev. Dist., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022). But courts also agree that application of the discovery rule is fact intensive and prone to credibility and other factual disputes. *Lorentz v. Sunshine Health Prod., Inc.*, No. 09-61529-CIV, 2010 WL 3733986 at *5-6 (S.D. Fla. Aug. 27, 2010). Some courts look to see whether there was “smoke necessary to put [[p]laintiff] on inquiry notice that a fire started.” *Luar Music Corp. v. Universal Music Grp., Inc.*, 847 F. Supp 2d 299, 311 (D.P.R. 2012). Still other courts talk of “storm warnings”. *E.g.*, *Grant Heilman Photography, Inc. v. McGraw-Hill Glob. Educ. Holdings, LLC.*, No. CIV.A. 12-2061, 2015 WL 1279502 at *20 (E.D. Pa. Mar. 20, 2015) (finding that it was a very close question as to whether plaintiff should have been aware of “storm warnings” and denying motion for judgment as a matter of law). But the reality is that, in more cases than not, courts have found that there are factual issues as to when the plaintiff discovered the infringement that require resolution at trial.

The difficulty for a defendant to prevail at the summary judgment stage on the issue of when the plaintiff discovered the work is illustrated by *Krist v. Pearson Educ., Inc.*, 419 F. Supp. 3d 904 (E.D. Pa. 2019). There, defendant publisher established during discovery that more than three years before the plaintiff photographer Krist commenced litigation, he was approached by an attorney who told him that Krist’s “name kept coming up” in searches the attorney had conducted in searching for possible claims, that

Pearson had a “track record of infringements” and that Krist might have a “goodly number” of infringement claims. *Id.* at 909. Despite this evidence, and the undisputed fact that Krist waited more than three years after meeting with the attorney and learning of his potential claims, the District Court found that there were jury issues as to whether his attorney had provided Krist with sufficient information to be placed on inquiry notice or to “excite storm warnings of culpable activity” and ordered the case to proceed to trial. *Id.* at 911; *see also Panoramic Stock Images, Ltd v. McGraw-Hill Glob. Educ. Holdings, LLC*, No. 12 C 9881, 2014 WL 6685454, at *3-4 (N.D. Ill. Nov. 25, 2014), *opinion clarified*, 2015 WL 393381 (N.D. Ill. Jan. 27, 2015) (denying summary judgment despite discussions with plaintiff’s lawyer before applied statute of limitations period regarding pattern of alleged infringement by publishers because plaintiff “maintain[ed] that it did not discover [defendant’s] specific infringing activity for each of its claims until discovery was completed in this case, or at least not until after it filed this lawsuit”); *Bean v. John Wiley & Sons, Inc.*, No. CV 11-08028-PCT-FJM, 2012 WL 1078662, at *3 (D. Ariz. Mar. 30, 2012) (denying summary judgment despite plaintiff’s prior lawsuits against other publisher and plaintiff’s lawyer’s prior knowledge of alleged infringements more than three years before filing).

Forcing a defendant to go all the way through fact discovery and then, in all likelihood, a trial, in an effort to establish that the plaintiff had or should have discovered the infringing conduct more than three years prior to commencement of litigation requires a defendant to go through precisely the time and expense that statutes of limitations are intended to avoid. As this Court has long recognized, the purpose of statutes of limitations is to “prevent[] surprises

through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers*, 321 U.S. at 348-49. Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights. *See Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980); *see also Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 313-14 (1945) (finding statutes of limitations are “practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost”). This purpose is not satisfied by the current situation.

III. By Adopting the Injury Rule, Amici and Others Avoid This Unnecessary Burden

Section 507(b) states that: “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” AAP contends that this language mandates that once three years has passed from the event causing the alleged injury, the plaintiff is barred from pursuing a claim no matter when it claims to have discovered it.

A. Legislative History Counsels in Favor of the Injury Rule

The legislative history of Section 507(b) supports this interpretation. The civil statute of limitations in the Copyright Act was added in 1957 because users of intellectual property were “interested in a fixed statute of limitations to know when they [would be] liable,” in the face of state statutes of limitations that differed dramatically. Copyrights—Statute of Limitations:

Hearing on H.R. 781 Before the House Comm. On the Judiciary, Subcomm. 3, 84th Cong. 40 (1955) (statement of Fulton Brylawski, Association of American Motion Pictures). Unfortunately, sixty-six years later, AAP and others still lack the clarity of a clear and predictable statute of limitations.

The legislative history also suggests that lawmakers believed that they were enacting a statute of limitations that operated under the injury rule. As the Senate Report accompanying the legislation indicates, “due to the nature of publication of works of art that generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights. The committee agrees that 3 years is an appropriate period for a uniform statute of limitations for civil copyright actions and that it would provide an adequate opportunity for the injured party to commence his action.” S. REP. No. 85–1014, at 2 (1957), reprinted in 1957 U.S.C.C.A.N.1961, 1962. In other words, in drafting the language of Section 507(b), legislators understood that copyright violations were typically public acts, making a discovery rule unnecessary. AAP’s members, despite being copyright owners or exclusive licensees themselves, agree. While the injury rule may lead to instances where members cannot enforce their rights, the tradeoff of having a definitive limit on claims carries much greater weight.

B. This Court’s Case Law Also Favors the Injury Rule

This Court’s case law also suggests that the injury rule is the proper choice. *First*, this Court has recently clarified that, where a statute is unclear, the Court is inclined to favor an injury rule. In *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), the Court noted that the Ninth Circuit had applied a discovery rule based

upon what it believed to be the Supreme Court’s general premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule “unless Congress has expressly legislated otherwise.” The Court in *TRW* explicitly rejected such a premise, finding that its precedent that the Ninth Circuit was relying on, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), “does not establish a general presumption applicable across all contexts,” and that the Court had applied a discovery rule only “in two contexts, latent disease and medical malpractice, where the cry for [such a] rule is loudest . . .” *TRW*, 534 U.S. at 27 (internal citation omitted). The Court made this clear in *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-361 (2019), calling the recent “expansive approach to the discovery rule . . . a ‘bad wine of recent vintage.’” (quoting *TRW*, 534 U.S. at 37, and declining to write a discovery rule into the law where Congress had not clearly done so); *see also Rotella v. Wood*, 528 U.S. 549, 550 (2000) (“[a] pattern discovery rule would allow proof even more remote from time of trial and, hence, litigation even more at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.”).

Second, where this Court has addressed the question of when a plaintiff can bring a copyright claim, it has implicitly, if not explicitly, endorsed the injury rule. In describing the Copyright Act’s statute of limitations, the Court in *Petrella* began with the premise that “[a] claim ordinarily accrues ‘when [a] plaintiff has a complete and present cause of action.’” *Petrella*, 572 U.S. at 670 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). From this, it reasoned that “[a] copyright claim thus arises or ‘accrue[s]’ when an

infringing act occurs.”⁵ *Id.* The Court went on to reconfirm that “[u]nder the Act’s three-year provision, an infringement is actionable within three years, and only three years, of its occurrence...the infringer is insulated from liability for earlier infringements of the same work.” *Id.* at 671. Although the Court noted that it was not passing on the injury vs. discovery rule debate (*id.* at 670 n.4), that language appears to clearly favor an injury rule.

The Court later repeated this rationale in a patent case, *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 580 U.S. 328 (2017). Rebuffing a request to write a discovery rule into patent law, the Court noted that it “is not ordinarily true” that a claim accrues upon discovery. *SCA*, 580 U.S. at 337-38. Citing *Petrella*, the Court noted that a claim instead “ordinarily accrues ‘when [a] plaintiff has a complete and present cause of action.’” *Id.* (quoting *Petrella*, 572 U.S. at 670).

Finally, this Court has in other circumstances interpreted the word “accrues”, which Section 507(b) employs, to be linked to injury. In *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010), the Court noted that “the general limitations rule [is] that a cause of action accrues once a plaintiff has a ‘complete and present cause of action,’” but held that a different rule might apply in the case of fraud (*id.* at 644), because

⁵ Circuit courts that have adopted the discovery rule have largely come to the opposite conclusion without any real analysis. As the Fifth Circuit recently acknowledged, albeit in a decision where it followed precedent in applying the discovery rule, its own precedent “did not explain why the discovery rule applied” and instead followed a prior, unpublished decision, without giving any rationale. *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 236 (5th Cir. 2023).

“a defendant’s deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded.” *Id.* “Otherwise, ‘the law which was designed to prevent fraud’ could become ‘the means by which it is made successful and secure.’” *Id.* (quoting *Bailey v. Glover*, 21 Wall. 342, 349, 22 L.Ed. 636 (1875)).⁶

IV. In the Absence of the Injury Rule, This Court Should Adopt *Petrella*’s Three-Year Cap on Damages

If this Court determines not to adopt the injury rule, it should nevertheless take steps to balance the equities in infringement cases by adopting the three-year lookback from *Sohm*, which is based on *Petrella*.

Without the ability to deviate from prior Second Circuit precedent, the *Sohm* court instead limited damages. Following the clear language from *Petrella* that “infringement is actionable within three years, and only three years, of its occurrence,” meaning that “the infringer is insulated from liability for earlier infringements of the same work” (*Petrella*, 572 U.S. at 671), the Second Circuit held that, while plaintiff was

⁶ Other exceptions to the statute of limitations would still be available to plaintiffs in particular situations, including the possibility that the limitation period could be tolled in a case where the defendant provided knowingly false or fraudulent information to a copyright owner, thus depriving it of the information it would need to commence litigation. *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014)) (“Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to ‘pursu[e] his rights diligently,’ and when an ‘extraordinary circumstance prevents him from bringing a timely action,’ the restriction imposed by the statute of limitations does not further the statute’s purpose.”).

not barred by the statute of limitations from pursuing his claim, his damages were limited to three years before filing. *Sohm v. Scholastic Inc.*, 959 F.3d 39, 51 (2d Cir. 2020). Although this approach leaves the burden of addressing untimely claims and locating years-worth of documents on defendants, it works to limit recovery and, potentially, to discourage stale claims. As noted above, the present state of the discovery rule allows a plaintiff to wait decades to bring suit, but recover damages for the entire period. This makes little sense, and benefits the indolent plaintiff. See *Cal. Public Employees' Retirement Sys. v. ANZ Securities, Inc.*, 582 U.S. 497, 504-505 (2017) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014)) (“Statutes of limitations are designed to encourage plaintiffs ‘to pursue diligent prosecution of known claims.’ In accord with that objective, limitations periods begin to run ‘when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief.’”).

Consider the facts of the case now before the Court. Had Sherman Nealy diligently monitored his alleged copyright interests, he could have sued Petitioner in 2008 (and there is evidence in the record that Nealy at least had good reason to check to see if his works were improperly being used). Instead he waited for ten years until 2018 to commence an action. Under the “injury” rule, Nealy could have obtained prospective relief as well as retrospective relief dated back three years to 2015. But given the Eleventh Circuit’s application of the “discovery” rule, Nealy can look for damages dating all the way back to 2008.

A comparison of the facts of this case with those in the *Petrella* case is instructive. There, Plaintiff was the successor to the copyright in screenplays for the

motion picture *Raging Bull*. Plaintiff knew of her claim as early as 1998 but waited 11 years until 2009 (after the motion picture had been released on DVD and Blu-Ray) to bring suit. Plaintiff conceded that she was entitled to damages only going back for three years to 2006. Defendant MGM argued that the claim should be barred by reason of the doctrine of laches given her knowledge of the claim and her delay in pursuing her rights. This Court found that laches did not apply, but confirmed that plaintiff could look back “three years, but only three years,” meaning that Petrella was limited to three years of damages.

But what would have happened if plaintiff claimed only to have “discovered” the infringing conduct when MGM announced the release of the film in new formats? In that situation, under the rule set forth by the Eleventh Circuit in this case and by other circuits, Plaintiff could have used the discovery rule to seek damages not only going back to 1998, but theoretically back to the original release of the film in 1980 (or perhaps to 1991, when plaintiff’s own copyright interest vested). The underlying facts of *Petrella* provide an excellent example of how the application of the discovery rules, especially when coupled with the indefinite look back period, punishes the diligent and rewards the indolent. The Plaintiff in that case would have been far better off had she claimed that she was unaware of the use of her copyrighted materials than she was by admitting that she had long been aware but had waited for the economic value of the defendants’ property to increase.

Application of the rule announced by the court below, and in the other circuits that have endorsed the discovery rule but have rejected the *Sohm* three-year limitation on retrospective damages begs the question

of how far back a plaintiff should be allowed to look. We already have seen cases that suggest that a look back of 10 or 20 years might be appropriate. On other facts might it be even longer? If a photographer suddenly “discovered” that a photograph he owned had been displayed on the wall of Rick’s Café in the film *Casablanca*, could he or his heirs claim damages going all the way back to the 1942 release of the claim. Or could the heirs of a composer claim that they had recently discovered that their work had been infringed by the use of song *As Time Goes By* in that same film? These hypotheticals may seem far-fetched, but the current state of the law is unclear and unpredictable.

Circuit courts that have declined to follow *Sohm* and impose this limit have done so because they claim that a three-year lookback on damages would “eviscerate” the discovery rule. *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 510 F. Supp. 3d 878, 886 (C.D. Cal. 2021), *aff’d*, 39 F.4th 1236 (9th Cir. 2022); *see also Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1331 (11th Cir. 2023), *cert. granted in part sub nom. Warner Chappell Music v. Sherman Nealy*, No. 22-1078, 2023 WL 6319656 (U.S. Sept. 29, 2023) (agreeing with the Ninth Circuit). Not so. Copyright holders would still be able to bring suit and garner prospective relief like an injunction. Moreover, as *Petrella* itself confirms, under the separate accrual rule, by which “each infringing act starts a new limitations period” (*Petrella*, 572 U.S. at 671), plaintiffs remain able to address harms that occur within the prior three years. What they would not be able to do is to go back indefinitely for damages after burying their head in the sand for decades.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eleventh Circuit's judgment. This Court should adopt the injury rule as governing the application of the statute of limitations in copyright cases or, at a minimum, hold that a copyright plaintiff may not recover damages for more than three years prior to the commencement of an infringement action.

Respectfully submitted,

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