1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAULA PETRELLA, :

4 Petitioner : No. 12-1315

5 v. :

6 METRO-GOLDWYN-MAYER, INC., ET AL. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, January 21, 2014

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:06 a.m.

14 APPEARANCES:

15 STEPHANOS BIBAS, ESQ., Philadelphia, Pennsylvania; on

16 behalf of Petitioner.

17 NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; for

19 United States, as amicus curiae, supporting

20 Petitioner.

21 MARK A. PERRY, ESQ., Washington, D.C.; on behalf of

22 Respondents.

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1 P R O C E E D I N G S
2 (11:06 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-1315, Petrella v.
5 Metro-Goldwyn-Mayer.
6 Mr. Bibas?
7 ORAL ARGUMENT OF STEPHANOS BIBAS
8 ON BEHALF OF THE PETITIONER
9 MR. BIBAS: Mr. Chief Justice, and may it
10 please the Court:
11 This Court has never applied laches to
12 constrict a federal statute of limitations, and rejected
13 such a claim just four years ago. Laches cannot bar
14 these copyright infringement claims for four reasons.
15 First, under the separate accrual rule,
16 these claims are timely. Respondents committed these
17 discrete wrongs from 2006 on, but would use Petitioner's
18 failure to challenge earlier wrongs to foreclose these
19 later claims before they even arose.
20 Second, laches is a gap filler, but Congress
21 filled this gap with a bright-line statute of
22 limitations. Third, Congress chose a clear, predictable
23 timeliness rule. And fourth, injunctive relief must
24 remain available to protect Petitioner's property right
25 against ongoing violations, lest Respondents effectively

1 get a compulsory license for free for the next four
2 decades.
3 JUSTICE SCALIA: Let's -- let's take your
4 second point. What a statute of limitations says is not
5 that you are -- are scot-free within the statute of
6 limitations period. It simply is a negative. It says
7 you can't be sued beyond that, right?
8 MR. BIBAS: Yes. The wording of the statute
9 of limitations --
10 JUSTICE SCALIA: So it seems to me there is
11 nothing -- if -- if we adopted the position of the other
12 side, there's nothing that would cause the statute of
13 limitations to be frustrated.
14 MR. BIBAS: This is not purely about the
15 text, but about the background principle of equity that
16 laches is. Laches domain was as a gap filler where
17 there was no -- no timeliness rule. Congress has
18 occupied the field with a timeliness rule here and
19 displaced it.
20 That's why laches developed in equity to
21 compensate for the absence of limitations periods.
22 JUSTICE SCALIA: Yes, but it continued to be
23 used in equity, even when there were limitations period,
24 didn’t it? It may have started that way, but that was
25 certainly not its only use.

1 MR. BIBAS: Not where there was a binding, a
2 Federal one. Where there was an analogous one that was
3 borrowed loosely from a State in diversity, Federal
4 courts understood themselves to have flexibility to vary
5 from the State limitation period because it wasn't
6 Federal law.
7 JUSTICE SCALIA: Well, it was Federal law.
8 Federal law adopted it. It was Federal law.
9 MR. BIBAS: This was in the pre-Erie days,
10 where there was understanding that there was a
11 general Federal common law, an equity, that those cases
12 were decided, that -- this court in Holmberg v.
13 Armbrecht understood this almost as a Chevron-type
14 argument.
15 Has Congress spoken to the timeliness issue?
16 If yes, Holmberg says the congressional statute is
17 definitive. If not, Holmberg says, then its silence
18 delegates the matter to, quote, "judicial implication."
19 And then there's some judicial flexibility
20 on timeliness issues. There's no question that
21 non-timeliness doctrines can cut claims off within the
22 limitations period, but not the timeliness doctrine of
23 laches.
24 JUSTICE ALITO: Should we see anything in
25 the particular way this provision is worded? It says,

1 "No civil action shall be maintained under the
2 provisions of this title unless it is commenced within 3
3 years after the claim accrued."
4 It doesn't say, "Any civil action may be
5 maintained if it is commenced within 3 years after the
6 claim occurred."
7 MR. BIBAS: Yes, Your Honor. That's why --
8 JUSTICE ALITO: So it doesn't -- you know,
9 it says -- it says you can't do it, unless it's within
10 three years, but it doesn't say that, if it's within
11 three years, you’re home-free.
12 MR. BIBAS: Yes, Your Honor. That's why I
13 said it's not strictly a textual argument. It's about
14 the domain of laches and the congressional understanding
15 of limitations periods. That's what -- how this Court
16 read them in the Ledbetter case. If I might quote, "A
17 freestanding violation may always be charged within its
18 own charging period, regardless of its connection to
19 other violations."
20 We repeated the same point more recently in
21 Morgan. Quote, "The existence of past acts and the
22 employee's prior knowledge of their occurance...does not
23 bar employees from filing charges about related discrete
24 acts, so long as the acts are independently
25 discriminatory and charges addressing those acts are

1 themselves timely filed."

2 This Court's understanding in Morgan and in

3 Ledbetter was the period is to remain open and

4 timeliness doctrines are not to cut them short because

5 those doctrines, such as laches, are where there isn't a

6 binding congressional statute of limitations.

7 JUSTICE BREYER: Why, by the way -- I mean,

8 I guess the ones that increase the statute of

9 limitations, do they apply, too? It doesn't say

10 anything about them.

11 MR. BIBAS: The timeliness doctrines of

12 tolling and the discovery rule are distinguishable.

13 This Court understands that when Congress -- tolling and

14 discovery rules developed in order to interpret

15 limitations periods. You cannot have a tolling or

16 discovery rule without a limitations period to

17 interpret.

18 So this Court has said it's an accoutrement.

19 It's intertwined with interpreting the word "accrues,"

20 for a discovery rule, or interpreting "3 years." Do you

21 count the period of infancy? Do you count Saturdays or

22 Sundays? It interprets the statute of limitations.

23 JUSTICE BREYER: Can I just take exactly

24 your words, and I fill in, instead of "tolling,"

25 "laches"? So?

1 MR. BIBAS: Tolling has always been used --
2 JUSTICE BREYER: Yes, yes, yes. All right.
3 But I mean, now, what you're talking about is custom.
4 You're not talking about language.
5 MR. BIBAS: Right.
6 JUSTICE BREYER: Because the language sounds
7 to me like the same. And so then I'm obviously going to
8 ask you if the court -- courthouse burns down or
9 fraudulent concealment or -- you know, there are dozens
10 of -- not dozens, but there are quite a few such
11 doctrines.
12 And why would we apply those and not apply
13 the shortening ones, too.
14 MR. BIBAS: Well, first, briefly,
15 Respondents concede there are no words in this Act that
16 even give a toehold for laches. But second, the state
17 of the law in 1957 and to this day is that tolling and
18 discovery rules were long background periods for
19 interpreting limitations rules. Laches has never been.
20 This Court --
21 JUSTICE SCALIA: But they originated in
22 equity, just as laches did. The tolling rules
23 originated in equity. They were brought into law. What
24 troubles me about this case is this: Did the adoption
25 of the new Rules of Federal Procedure disable courts

1 from bringing over anything else from equity into law?
2 Tolling used to exist. It was brought over
3 into law before the new Rules of Civil Procedure. And
4 therefore, you would not be altering any substantive
5 right to continue to apply that tolling rule.
6 Your argument here is -- is that to apply
7 laches is to alter a substantive right, and therefore,
8 under the -- under the Rules Enabling Act is not
9 allowable.
10 My question is this: Do you think that the
11 Rules Enabling Act prevented courts from doing what they
12 had in the past? That is, not using the Act as the
13 means of saying everything that was in equity is now in
14 law, but rather sitting back and thinking -- you know,
15 here's another part of equity that should be brought
16 over into law, not because the Act says so, but because
17 we think it ought to be, just as we thought, 50 years
18 ago, the tolling -- the -- the tolling provision should
19 be brought over into law.
20 Have courts been -- been disabled from doing
21 that by reason of the Act?
22 MR. BIBAS: Yes, not only the words of
23 Section 2072(b) that you may not "enlarge, abridge, or
24 modify any substantive right," but this Court's holding
25 in Grupo Mexicano recognized that the historical limits

1 on equitable remedies are limited to where they were at
2 the times --
3 JUSTICE SCALIA: But it says, "The rules
4 shall not alter or amend any substantive right." And
5 what I'm saying is it isn't the rules that do it. It's
6 just we have made the independent justification that
7 this ancient rule, which was applied in equity, ought to
8 be applied in law as well.
9 MR. BIBAS: I point to this Court's having
10 repeatedly rejected that extension in Mack and then
11 Russell and Holmberg and Oneida and Merck just 4 years
12 ago. This Court has repeatedly said laches cannot
13 shorten the statutes of limitations, it's not
14 applicable, especially since --
15 JUSTICE SOTOMAYOR: Could you -- do you have
16 to accept Justice Scalia's premise that the Court, in
17 all areas, is deprived of that right? Can you
18 concentrate on your -- your arguments why, in this
19 particular Act, even if we had the option, we shouldn't
20 exercise it?
21 MR. BIBAS: Yes, Your Honor. I think it's
22 very salient that this is the Copyright Act, an Act with
23 detailed statutory safeguards against financial and
24 evidentiary prejudice. Moreover, copy -- the copyright
25 is a property right registered with the government with

1 a clear registry that wants clear, simple, predictable,
2 easy-to-apply rules, as the policy of the '76
3 Copyright Act.
4 And this Court's case law, in the trademark
5 context from the late 19th century, says, when we're
6 dealing with a property right that extends into the
7 future, injunctive relief has to remain available to
8 vindicate that property right, unless there is something
9 that rises to the level of a distinct defense, an
10 abandonment or an estoppel.
11 But the --
12 JUSTICE SOTOMAYOR: You see, counselor, this
13 is my problem. And -- and I sort of disagree with you
14 fundamentally because I don't know that you're entitled
15 to injunctive relief, but you might be entitled to a
16 compulsory license.
17 And by that, I mean you have -- this is the
18 government's position, and maybe I'm arguing for it, the
19 government says you might be entitled to payment for the
20 use of your copyright because it belongs to you and
21 there shouldn't be some adverse possession right that
22 the other side gets.
23 But in terms of injunctive relief, given
24 their reliance on your failure to act for 18 years, they
25 shouldn't be put out of business and told that they

1 can't continue in their business.

2 And so that's the kind of policy I'm talking

3 about, which is break down the remedies and tell me --

4 I'm more moved by the fact that someone could take over

5 your copyright than I am by your injunctive relief

6 argument.

7 MR. BIBAS: Yes, Your Honor. You're correct

8 that the Copyright Act has provisions that forbid

9 adverse possession, that require transfers to be in

10 writing, and so the right itself can't be defeated. So

11 I agree with your premise.

12 Now, as to how that bears on injunctive

13 relief, we do not take the position that an injunction

14 must automatically issue. This Court in eBay said very

15 clearly it mustn't, but one must look at the traditional

16 test for equitable relief.

17 And one of the factors in that test is

18 prejudice to the defendant, but it must be balanced

19 against prejudice to the plaintiff and the public

20 interest. And that is foreclosed if one uses laches as

21 a threshold bar.

22 It's foreclosed if one uses it as a --

23 JUSTICE SOTOMAYOR: Why? You'd be entitled

24 to money for their infringement. 3 years -- you only go

25 back 3 years, but if they continue to infringe in the

1 future, presumably, you can get an order giving you
2 damages for that.
3 MR. BIBAS: We certainly agree that we're
4 entitled to damages, going forward, but we don't agree
5 that that's exclusive because I -- I'd point to the
6 Chief Justice's concurrence in the eBay case. A
7 copyright is a property right.
8 It comes with the right to exclude
9 presumptively. That right cannot necessarily be fully
10 enforced in all circumstances, but presumptively, it
11 ought to remain on the table to enforce with injunctive
12 relief.
13 Now, you are correct, Respondents have
14 entered into commercial agreements -- arrangements for
15 the next two years. It would be reasonable for a court
16 sitting in equity to say, let's balance the hardships.
17 The hardships between now and 2015 might look different
18 from the hardships in 2015 until the middle of the 21st
19 Century.
20 We might tailor the duration and the scope
21 of injunctive relief to save some damages, some
22 royalties for a few years, but that's not a reason to
23 defeat her right to exclude for the next four decades.
24 JUSTICE KAGAN: Mr. Bibas, I would have
25 thought that there was something in the copyright

1 context that cuts against you, and that's that, because
2 of this separate accrual rule and the feature of these
3 rolling statutes of limitations combined with very, very
4 lengthy copyrights terms, that essentially a plaintiff
5 cannot bring suit for years -- decades -- and time the
6 suit in order to maximize her own gain.
7 That strikes me as something that we don't
8 usually see in statute of limitations cases. I mean,
9 we don't have very many cases where courts have applied
10 laches as against the statute of limitations, but that's
11 because you can't think of many instances in which it
12 would be considered unfair to take the entire statute of
13 limitations to bring a suit.
14 But in this context, you look at something
15 that seems very different. A plaintiff can wait 20
16 years, given the way the separate accrual work -- rule
17 works.
18 MR. BIBAS: Your Honor, I think your
19 considerations cut in favor of our position. Whether
20 our client brings suit now or 20 years from now, she
21 gets three and only three years' damages. The evidence
22 in this case is that creative works are worth the most
23 right after they're released, and so the value of the
24 claim goes down.
25 Respondents get to keep the first 17 years

1 of profits if she waits. So she has every incentive, as
2 the amicus briefs indicate, to file suit early. And,
3 indeed, courts can use adverse inferences against
4 plaintiffs who delay -- draw inferences and missing
5 witness instructions from their delay.
6 But let me point out that there are plenty
7 of situations in which there is a delay in suit. Take
8 Bay Area Laundry. Take a standard 30-year mortgage.
9 The mortgagee who waits until year 20 doesn't get to
10 claim 20 years' worth of payments, but there's nothing
11 that debars that mortgagee from claiming payments for
12 years 17 to 20. It would radically upend the law to say
13 that.
14 And to come back to your point that we don't
15 see laches in these cases, that, again, cuts our
16 direction.
17 JUSTICE SCALIA: Yeah, but the -- the
18 mortgagor does -- does not invest substantial amounts of
19 money the way MGM did here, on the assumption that,
20 since suit hasn't been brought for 20 years, there's --
21 there's no valid claim. I mean, that's the difference
22 in that situation.
23 You're talking about inducing -- or causing
24 at least, people who -- who proceed in good faith on
25 the assumption that 20 years have gone by. Nobody --

1 nobody has questioned our doing it.
2 They invest substantial amounts of money,
3 and then, when that money starts to pay off, you file
4 suit and -- and you get three years' worth of -- of
5 their profits.
6 MR. BIBAS: Under the Copyright Act, they
7 are entitled to deduct all the expenses that are
8 attributable to earning the profits from infringement,
9 so Plaintiffs don't get a dime until Respondents recoup
10 those expenses.
11 Moreover, one who has notice of a registered
12 copyright in the face of protest has no legitimate
13 good-faith expectation and continue to infringe. Either
14 file a declaratory judgment act, engage in settlement
15 negotiations, or infringe at your peril.
16 I'd like to reserve the balance of my time
17 for rebuttal.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Ms. Saharsky.
20 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
21 FOR UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONER
23 MS. SAHARSKY: Mr. Chief Justice, and may it
24 please the Court:
25 The only question before the Court is

1 whether the courts below were right to bar this suit
2 entirely on laches ground. And on that question, we
3 agree entirely with Petitioner, that the suit should not
4 have been barred at the outset. But it is the
5 government's view that laches is available in
6 extraordinary cases to bar copyright infringement claims
7 brought within the statute of limitations for two
8 reasons.
9 First of all, laches, like equitable tolling
10 and other equitable principles, was a background
11 principle that Congress acted against when it enacted
12 the statute of limitations, and it said nothing to bar
13 it. We've already had the discussion here at Court
14 today about the text and how it doesn't bar it.
15 But second, for the reasons that
16 Justice Kagan gave, the copyright situation is unique in
17 that there is this separate accrual rule, which allows a
18 person to sue many years after the infringing conduct
19 started, so that it makes sense to at least be able to
20 consider laches.
21 Now, our view, though --
22 JUSTICE GINSBURG: On damages as well as
23 injunctive relief? I thought your brief said injunctive
24 relief, but not damages.
25 MS. SAHARSKY: Right. We would distinguish

1 between equitable relief and legal relief, and that's
2 because that distinction was well-established in the
3 courts of equity and in the courts of law and
4 post-merger at the time this Court enacted in 1957.
5 JUSTICE KAGAN: We don't make that
6 distinction with respect to equitable tolling. Why
7 would we make it here?
8 MS. SAHARSKY: Well, because the history is
9 different. The history that this Court recognized in
10 cases like Mack, for example, 1935 case, where that
11 was a legal claim, the Court said, laches within a term
12 of the statute of limitations, is no defense of law.
13 And the Court has continued to pick up that
14 language in case after case. There are numerous cases
15 cited in the briefs. There was a 1985 --
16 JUSTICE SCALIA: Why can't we change our
17 mind? Why can't we change our mind?
18 MS. SAHARSKY: Because this is a statutory
19 claim that -- and a statute of limitations that Congress
20 put in place. And the question is: What is the
21 background rule against which Congress was acting?
22 Congress could change the background rule, but because
23 this is a statutory action, it's for Congress to do it,
24 as opposed to the Court.
25 JUSTICE SCALIA: And you say that none of

1 the other instances in which we brought into law
2 equitable doctrines, none of those were applied with
3 respect to a prior enacted Federal statute? Is that
4 your position?
5 MS. SAHARSKY: No.
6 JUSTICE SCALIA: Well, I'll have to look it
7 up.
8 MS. SAHARSKY: Right. What I'm saying is
9 specific to the laches defense -- and what I'm saying
10 there is that there is a long history that laches did
11 not apply at law and that this Court has continued to
12 recognize that --
13 JUSTICE SCALIA: There was a long history
14 that tolling didn't apply at law, and then we changed
15 our mind.
16 MS. SAHARSKY: Right. Right. But I'm
17 saying --
18 JUSTICE SCALIA: And you're saying we -- we
19 never changed our mind where there was a statute of --
20 Federal statute of limitations? I -- I don't believe
21 that.
22 MS. SAHARSKY: I'm saying that, in the
23 laches context, we are not aware of any instances in
24 which this Court has used laches to bar a claim at
25 law --

1 JUSTICE BREYER: That's not surprising
2 because, to show laches, you have to show unreasonable
3 delay plus reliance. So normally, it won't be
4 unreasonable within a limitation period, but this is a
5 unique statute. The uniqueness is not in the words, but
6 in the facts.
7 And therefore, the uniqueness is that it's
8 rolling. And as long as you have a movie that's going
9 to make money over 30 years, in year 33, they bring an
10 action against something that didn't happen till
11 year 30.
12 So when the government comes in and says,
13 oh, we'll just allow it as a defense -- you know, to law
14 but not to injunction, law here has the same effect as
15 an injunction. If you just leave it up to the legal
16 part, they can bring whenever they want, as long as the
17 movie is still making money.
18 And therefore, it has exactly the same
19 effect to let them -- they say, oh, you can't recover --
20 I mean, you can recover under law, you just can't have
21 an injunction. Who in their right mind would go ahead
22 and make this year after year, if a huge amount of money
23 is going to be paid to this copyright owner who delayed
24 for 30 years and didn't even seem to own it?
25 MS. SAHARSKY: Well, two -- two responses to

1 that. First, as a general matter, we think it makes
2 sense for the laches defense to apply in -- in
3 fashioning equitable relief because that is a place
4 where judges are exercising discretion --
5 JUSTICE BREYER: I understand the words. My
6 specific question is, in the copyright area, as here --
7 MS. SAHARSKY: Yes.
8 JUSTICE BREYER: -- once you have given them
9 the right to apply laches to an injunction, you have
10 given them precisely nothing because exactly the same
11 thing will happen to them once you bring 15 legal
12 actions, as if you gave them the injunction.
13 And if there is a difference there, I
14 haven't been able to think of it yet. So -- so I don't
15 really understand the government's position in terms of
16 the practice.
17 MS. SAHARSKY: Okay. In terms of the
18 practical offense, the -- the Copyright Act statute
19 specifies the particular remedies that are available,
20 and it's fairly clearly distinguished between legal and
21 equitable remedies. The legal remedies are actual or
22 statutory damages, and those are limited to the past
23 three years.
24 And then the equitable remedies are the
25 profits of the defendant, the essentially unjust

1 enrichment of the defendant, and then, as you mentioned,
2 Justice Breyer, the injunction situation.
3 Now, we are not saying that if -- if a
4 plaintiff has established copyright infringement, that
5 it's an all or nothing on injunctions. This Court
6 recognized in eBay --
7 JUSTICE BREYER: You still haven't answered
8 my question --
9 MS. SAHARSKY: I'm trying to.
10 JUSTICE BREYER: -- which comes to the same
11 thing. You're giving me legal arguments. You may be
12 right in that. I'll look into that.
13 But I'm saying, in practice, no one in his
14 right mind could go and continue to produce this movie
15 when every penny is going to have to go to the copyright
16 owner -- not every penny that they spent, but every
17 penny of profit. And -- and who's going to do it?
18 Because, every three years, they face a lawsuit.
19 MS. SAHARSKY: Well, that's what I'm trying
20 to say is that I don't think that that would be the case
21 if infringement were shown. This Court, for example,
22 recognized in the New York versus Cassini case, that in
23 fashioning injunctive relief, it's not just that you
24 give an injunction or you don't give an injunction, it
25 could be the case that, in a situation like this one,

1 for example, the Court could say, I will allow the
2 defendant to continue with these contracts that it has
3 entered into to continue using this film as a derivative
4 work, but I will pay a reasonable royalty, or I will put
5 forth -- call for a reasonable royalty to the plaintiff.
6 So there is some splitting of the difference
7 available to the Court in fashioning equitable remedies.
8 So I don't think the Court --
9 JUSTICE SCALIA: Could that equitable remedy
10 overrule the statement that you're entitled to sue for
11 all the profits within that 3-year period? You're
12 saying the injunction can -- can, in effect, say you
13 don't have to pay?
14 MS. SAHARSKY: Well, these are two different
15 remedies. There's the profits of --
16 JUSTICE SCALIA: Well, I understand that,
17 but does the second eliminate the first? If it doesn't
18 eliminate the first, Justice Breyer's point is
19 absolutely correct.
20 MS. SAHARSKY: I think that both are
21 susceptible to the Court's equitable consideration. The
22 profits -- the way that that is addressed in the
23 Copyright Act is that it is the profits of the
24 defendant, and you subtract out what the defendant
25 contributed.

1 JUSTICE KENNEDY: Well, then -- then -- you
2 said both are subject to equitable consideration. We're
3 told by the Petitioner that the equitable rule of laches
4 simply can't apply. I was going to ask: Estoppel
5 applies; why isn't laches just a first cousin of
6 estoppel? Estoppel is an affirmative misrepresentation.
7 Why isn't laches here almost a misrepresentation?
8 And I don't understand the difference
9 between laches and estoppel in this respect. Estoppel
10 was an equitable remedy that's been taken into the law.
11 MS. SAHARSKY: Right. They are related, but
12 different. Laches involves sitting on your rights, to
13 the detriment of the defendant, whereas equitable
14 estoppel involves affirmative -- affirmative things, but
15 the plaintiff has --
16 JUSTICE KENNEDY: But suppose sitting on
17 your rights amounted really to an affirmative
18 representation. It seems to me very close, close enough
19 so that I'm not sure that we should distinguish between
20 laches and estoppel as being, so that the -- so that the
21 former is unavailable at all.
22 MS. SAHARSKY: Well, you're right that --
23 that laches can -- is a cousin of equitable estoppel and
24 that it's right that equitable estoppel could bar the
25 claim entirely. The reason that we are distinguishing

1 between law and equity are two reasons. First of all,
2 there is a very long history that laches is unique to
3 the courts of equity, and this Court has recognized it.
4 It recognized it in Mack, it recognized in
5 the Oneida case, it recognized it in Merck, it was in
6 the Pomeroy treatise, that this was a classic division
7 that was only in equity, and this Court has continued to
8 recognize it.
9 But the second reason is that it makes sense
10 to look to laches principles in fashioning equitable
11 relief in this context as opposed to the legal relief,
12 because under the Copyright Act, when a person shows, a
13 plaintiff shows infringement, that person is entitled to
14 actual or statutory damages in a certain amount. And
15 that is a mechanical calculation that we expect juries
16 to make.
17 But it's not the --
18 JUSTICE GINSBURG: Ms. Saharsky, this --
19 before you sit down, there's one puzzle I'd like you to
20 address for us, and that is your position is damages
21 within the 3 years, okay; injunction, you can adjust for
22 the laches.
23 In the patent area, and also intellectual
24 property, the Federal Circuit has said that laches may
25 bar as it goes -- just the reverse, laches may bar

1 monetary relief, but not injunctive relief.
2 What explains the difference between, in the
3 patent area, no monetary relief, but yes, injunctive
4 relief, and your position in the copyright area,
5 monetary relief but no injunction or a modified
6 injunction?
7 MS. SAHARSKY: You're right that there is
8 that difference. The Patent Act is different in several
9 respects. First of all, in terms of the time period, it
10 doesn't have a statute of limitations in which -- after
11 which a claim is barred. It says that you can only
12 recover damages for a certain period of time. There's
13 actually a shorter period of limitation -- or a shorter
14 period of protection in the Patent Act, and you have the
15 Patent Act time period that was enacted well before the
16 copyright period here.
17 So we think that the patent context is
18 different, but I take your point that the analysis that
19 the Federal Circuit underwent is not the same type of
20 analysis that we are undertaking now. Ours is based on
21 the background principle on which Congress acted, as
22 opposed to that analysis, which was more on policy
23 grounds.
24 Thank you.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Perry.
2 ORAL ARGUMENT OF MARK A. PERRY
3 ON BEHALF OF THE RESPONDENTS
4 MR. PERRY: Mr. Chief Justice, and may it
5 please the Court:
6 The government agrees with us that the 1957
7 amendment did not abrogate the laches doctrine. Since
8 that's the only question presented, we submit that the Court
9 should affirm.
10 Now, the government has gone at great length
11 about this law-equity distinction. The Copyright Act of
12 1909, in Section 27, abolished the distinction between
13 law and equity for copyright purposes, Section 27 of the
14 1909 Act. The Law and Equity Act of 1915 abolished the
15 same distinction for all civil actions.
16 It says, "In any action at law, all
17 equitable defenses may be asserted." And if one looks
18 in Black's, for example, a reactive source, not a
19 predictive source, what is an equitable defense? It
20 says, "A defense formerly available at equity, now
21 available in all actions." And examples are unclean
22 hands, laches, and estoppel. That's in the Black's Law
23 Dictionary.
24 And then this Court, after the Rules
25 Enabling Act, Justice Scalia, of 1934 -- which is

1 different, by the way, than 2072 in the current statute.
2 The '34 version, which is in the back of our brief,
3 broke out law and equity, retained this Court's
4 equitable powers and authorized the Court to merge them.
5 And in rule 8, this Court did exactly that. This Court
6 surveyed the
7 available defenses --
8 JUSTICE SOTOMAYOR: Counsel, how do you deal
9 with the language in Holmberg, Mack, and Russell?
10 MR. PERRY: Your Honor --
11 JUSTICE SOTOMAYOR: Then you're after --
12 I've looked, I’ve had -- not myself, but my law clerk --
13 looked at all of the cases, and they are absolutely
14 right, that in every case we've applied laches, it's
15 only where there's not been an underlying statute of
16 limitations.
17 And in every case in which there's an
18 underlying statute of limitations, we have said no
19 laches.
20 MR. PERRY: Justice Sotomayor, let me answer
21 that in two steps. The Morgan case involved a statute
22 of limitations. The Court applied laches -- or said
23 laches was available five times, and that's an action at
24 law. That plaintiff brought a claim for compensatory
25 and punitive damages.
26 So that's the most recent version where all

1 of those things are not true that the Petitioner says.
2 Also, the --
3 JUSTICE SOTOMAYOR: They lost there.
4 MR. PERRY: I'm sorry?
5 JUSTICE SOTOMAYOR: They didn't apply laches
6 there.
7 MR. PERRY: Your Honor, this Court said that
8 laches was available five times --
9 JUSTICE SOTOMAYOR: But the facts didn't
10 support that, meaning that they didn't grant such --
11 MR. PERRY: It wasn't raised, Your Honor.
12 That point wasn't raised. This Court said, over five
13 times, that where you have a rolling statute of
14 limitations, laches is a necessary protection for the
15 defendant because the events may move so far away from
16 the underlying facts, which is very true here.
17 The Holmberg case is, in many ways, our best
18 case, Justice Sotomayor. Let's look at what Holmberg
19 said. Holmberg was, remember, discussed in the
20 legislative history. Congress -- somebody in Congress
21 focused on it. It says, first, when Congress leaves to
22 the Federal courts the formulation of remedial details,
23 it can hardly expect them to break with historic
24 principles of equity.
25 And we know, from both the House and the

1 Senate report, this 1957 statute specifically said the
2 remedial details are up to the court because we want the
3 courts to continue to apply equitable considerations.
4 So what are those equitable principles?
5 This Court went on in Holmberg and said, first, a suit
6 in equity may fail though not barred by the act of
7 limitations. That's a pretty clear equitable principle,
8 and, of course, we win this case under that principle.
9 And then the Court went on and articulated
10 the goose-and-gander rule, that these are two sides of
11 the same coin; that laches and tolling go together.
12 They travel together. They are not cousins, Justice
13 Kennedy. They are fraternal twins. You don't get one
14 without the other.
15 And what the Court said is if want of due
16 diligence by the plaintiff may make it unfair to pursue
17 the defendant, laches, then also fraudulent conduct on
18 the part of the defendant may make it unfair for the
19 plaintiff to proceed -- fraudulent concealment.
20 And then the Court said -- and this is the
21 critical point -- it cited Bailey v. Glover, which also
22 had the goose-and-gander rule embedded in it. It said
23 this equitable doctrine is read into every Federal statute
24 of limitations; not fraudulent concealment, but the twinned
25 nature of tolling, plus laches, that every time the

1 courts have the power to adjust the rights and
2 obligations of the parties using their equitable powers,
3 that happens on the front end and on the back end.
4 My friend, Mr. Bibas, has to respond to that
5 by saying, Tolling is available, discovery is available,
6 waiver, abandonment, acquiescence, estoppel, and all of
7 the other equitable doctrines, eight of which are listed
8 in rule 8 that this Court has determined are available
9 in all civil actions.
10 But he says, laches -- which this Court also
11 listed in rule 8, is not available in this civil action.
12 That is a bizarre argument, Your Honor, and it has no
13 support whatsoever. This Court confronted the same
14 point -- excuse me.
15 JUSTICE KAGAN: "Bizarre" seems to me a
16 little strong, I mean, because I take it that Mr. Bibas
17 is making a statutory argument -- I mean, he's saying
18 not the language of the statute, but he's saying what
19 was Congress thinking at the time. Congress was faced
20 with all of these precedents, essentially saying laches
21 was not available. There are no cases out there,
22 really, where laches does cut into a defined statute of
23 limitations period.
24 And then you have the feature that
25 Congress knew that it was enacting these rolling

1 statutes of limitations, you would have thought that it
2 might have been foremost in their head, how are we going
3 to prevent somebody from suing 30 years later? And they
4 did nothing of the kind.
5 They could very easily have made it clear
6 that laches applied, or they could have set an outer
7 limit, or they could have done a number of things, and
8 they really didn't do any of them. So how are we to
9 account for all that?
10 MR. PERRY: Justice Kagan, the Congress
11 cited Holmberg, which cites Patterson as the leading
12 laches case, and cites Russell as well, and Patterson
13 dealt with this very point. Patterson, which did
14 hold --
15 JUSTICE SCALIA: Excuse me. Congress cited
16 what?
17 MR. PERRY: I'm sorry. The -- the committee
18 reports cite the Holmberg case, not Congress. Sorry.
19 Thank you, Your Honor.
20 The Patterson case, however, squarely
21 held -- and, Justice Sotomayor, this goes to your
22 question too -- that a claim brought within the statute
23 of limitations, a State statute borrowed for a Federal
24 claim, and this involved property, copyrights are property, this
25 involved a gold mine, and it's exactly analogous.

1 What happened there is the plaintiff sat
2 around, had a part interest in the gold mine, sat around
3 and waited until somebody else developed it enough to
4 make a profit and then rushed in and demanded a share.
5 That is what Ms. Petrella did in this case. She is
6 demanding her share in the gold mine after my clients
7 spent years developing it, okay?
8 What Congress --
9 JUSTICE SOTOMAYOR: It is true, however,
10 that your -- while you -- all of your investment in this
11 is going to be offset against your profits, correct?
12 MR. PERRY: That is not exactly clear, Your
13 Honor. She sued in January of 2009 to pick up the
14 profits back to January of 2006. The biggest investment
15 was in 2005 for the 25th anniversary edition. We think
16 she's going to go into to court and say, "I don't have
17 to offset that because it's more than three years old."
18 So that she wants only -- she wants to skim
19 the cream. She gets to look back and pick her three --
20 JUSTICE SOTOMAYOR: You didn't -- what's so
21 bad about that?
22 MR. PERRY: Because, Your Honor --
23 JUSTICE SOTOMAYOR: Why should you -- you've
24 gotten a lot of profits in those 18 years, and, in fact,
25 at one point, when she did reach out to you, you told

1 her, "Why sue? You're not going to get any money.
2 We're not making any."
3 MR. PERRY: Your Honor, on a net basis, the
4 film still has never made a profit, for one --
5 JUSTICE SOTOMAYOR: Well, if it has not,
6 then we're back to the point I made. Are you
7 disagreeing with the Government's position that the
8 Court has equitable power in injunctive relief to decide
9 how much you pay forward?
10 MR. PERRY: Two answers, Your Honor. First,
11 Congress looked at that -- and this is the reason that
12 the statutory damages remedy is in the statue -- to
13 encourage rights asserters to, early, go into court and
14 establish priority and availability of their rights if
15 they have them.
16 So if there are no profits, if there are no
17 damages -- of course, this plaintiff has no damages --
18 JUSTICE SOTOMAYOR: I don't understand. Why
19 didn't you just go in and get a declaratory judgment
20 when you first heard from her?
21 MR. PERRY: Because, Your Honor, we sent --
22 she made a demand, which we refused. We get lots of
23 demands, and we refuse them. And the last letter in the
24 series was, "You have no claim." Then she did nothing.
25 Actually, she did more than nothing. She showed up as

1 our guest at a party for the 25th anniversary,
2 suggesting that she agreed with our interpretation of
3 this. And then she didn't sue for years and years
4 later.
5 The events in question -- the reason that
6 the three year -- the ruling of three years is, as in a
7 Title 7 case, what's not being litigated in this case if
8 it were to go to trial is the last three years. It's
9 1961, '62 and '63. Whenever the film was released --
10 the disputed events happened in the early 1960s, so
11 that, every year she waits, for her own strategic
12 reasons, she's getting farther away from those events.
13 And this Court answered the same point in
14 Patterson about the mine. It said, of course, you can
15 apportion the profits to account for the investment, but
16 you can never -- you can never reimburse the developers
17 for the risk of getting naught. You can never reimburse
18 them for the work they did while she was sitting on the
19 sidelines, and, therefore, at some point, the reliance
20 interest was so great.
21 And then we haven't talked yet about the
22 evidentiary prejudice. These cases get so old, the
23 witnesses have died. They are unavailable. And she is
24 now trying to tell the Court -- the courts, the judicial
25 system, that her father lied in a written

1 representation, yet her mother, who could have testified
2 to that, has passed on.
3 JUSTICE SOTOMAYOR: Counsel, she was going
4 to get this copyright when her father died. Under no
5 circumstance, even if she had sued in '92, could she
6 have brought a claim in the 1960s. She didn't have a
7 copyright then.
8 MR. PERRY: You're absolutely right, Your
9 Honor.
10 JUSTICE SOTOMAYOR: Your complaint is not
11 against the witness dying. Your complaint is about what
12 Congress does, which is to give a person the right to
13 keep a copyright or renew it when the individual with
14 whom you probably dealt with is dead. That's always
15 going to be the case.
16 MR. PERRY: Justice Sotomayor, she still has
17 her copyright. She can enforce it against the world.
18 And she still has a contractual right with MGM in which
19 she will get participation rights pursuant to the
20 contract.
21 She wants to renegotiate that contract.
22 That's what this case about. She could have done that
23 in 1991. She could have brought this lawsuit in 1991.
24 We are not seeking to task her with her father's death
25 or anything that happened before 1991.

1 After 1991, however, Mr. LaMotta, key
2 witness as to the collaboration of the 1963 screenplay
3 has become unavailable to testify.
4 Vickie LaMotta, who could have established
5 our defense that the screenplay reflects real life,
6 rather than imaginary events, because she is a central
7 character in that, passed away.
8 And Mrs. Petrella, who -- if you read Paula
9 Petrella's declaration, she says, "My mother was up late
10 at night typing something," implying that it was the
11 book -- had she sued in 1991, we would have put her
12 mother under oath and said, "What were you typing?"
13 And she would have said, "The screenplay,"
14 or something else. She would not have said the book, we
15 believe, but we can't ask her that question because she
16 waited long enough for all the witnesses, not her
17 father, all the other witnesses who have percipient
18 knowledge to pass away.
19 And laches is a prejudice doctrine. It's
20 not a timeliness doctrine. It requires delay as a
21 trigger, but it turns on prejudice, and it's --
22 JUSTICE KAGAN: Mr. Perry, the Ninth Circuit
23 here used this language of presumption. It said, "If
24 any part of the alleged wrongful conduct occurred
25 outside of the limitations period, courts presume that

1 the plaintiff's claims are barred by laches," and you
2 just said, laches is, at least in part, a prejudice
3 doctrine.
4 MR. PERRY: Yes, Your Honor.
5 JUSTICE KAGAN: Do you concede that that
6 presumption is wrong?
7 MR. PERRY: No, Your Honor. First, I think
8 they spoke of a presumption and then didn't apply it, and
9 certainly, the district court didn't --
10 JUSTICE KAGAN: Well, that's one -- you
11 know, one understanding of the opinion is, look, that's
12 just nothing. But do you agree with it?
13 MR. PERRY: This Court, Justice Kagan, in
14 the Foster v. Mansfield case in 1892 said -- and I
15 quote -- after ten years, quote, "There is certainly a
16 presumption of laches, which it is incumbent on the
17 plaintiff to rebut," which is the same concept that the
18 Ninth Circuit articulated, although we submit, did not
19 apply.
20 And the Federal Circuit, in the Akerman
21 case, very carefully explained what this means. It's a
22 Federal Rule of Evidence 301 type presumption, sometimes
23 called a bursting bubble presumption, which says that
24 when the defendant raises this defense, it requires the
25 plaintiff to come forward with the burden of production

1 of an excuse or a rationale for the delay, but the
2 burden of persuasion always rests on the defendant
3 because it is an affirmative defense.
4 And the Akerman decision is very clear on
5 this, and to the extent the Ninth Circuit spoke of
6 presumptions, that's exactly what it meant because in no
7 place was an evidentiary presumption applied against
8 her, and, in fact, of course, this was a summary
9 judgment case, so the evidence was undisputed. The
10 record was irrefutable as to the prejudice.
11 JUSTICE KAGAN: Well, I guess, partly, that
12 suggests a burden of persuasion, but partly, it suggests
13 just a kind of starting position is that, if there was
14 conduct outside the limitations period, it was
15 prejudicial, and I guess I want to know why that would
16 be.
17 MR. PERRY: Your Honor, I think it's --
18 there's a common sense concept that, if you are within
19 -- if the claim were brought within the initial
20 three-year period, after the claim first accrued in
21 1991, you might say, colloquially, there's a
22 presumption that laches doesn't apply. In fact, the
23 Sixth Circuit said that in the Chirco case.
24 Once you move farther and farther away from
25 the initial act that starts the clock for laches

1 purposes, which may not be the same event, is for statute
2 of limitations purposes, it’s another one of the
3 disconnects between these two doctrines. The farther one
4 gets away, it is a reality of the world, as the
5 Government notes in its brief, that the evidentiary
6 prejudice is likely to increase because documents get
7 destroyed, witnesses lose their memory, and so forth.
8 JUSTICE KAGAN: Well, one can agree with
9 that and not think that if conduct happened three years
10 and two days earlier, there is -- that the burden of
11 coming forward and the necessity to give a reason flips
12 to the other side.
13 MR. PERRY: I agree with that, Your Honor.
14 And to be clear, the district court didn't apply any
15 such presumption and didn't put any such burden on
16 Ms. Petrella, so the language in the Ninth Circuit
17 opinion is irrelevant to when a case was tried in the
18 district court at the summary judgment stage, and
19 certainly irrelevant to the district's court conclusion,
20 which is reviewed, of course, for an abuse of discretion
21 standard -- you know, on the merits of the applicability
22 of laches doctrine.
23 All of which, by the way, the Petitioner
24 never raised in the district court, in the Ninth
25 Circuit, in the -- you know, the presumption appears for

1 the first time in the Petitioner's reply brief. The
2 government has brought it up that it was not -- you
3 know, it's not properly preserved. We're not afraid of
4 it.
5 This case came here on a very simple legal
6 question, a binary question, is laches available? The
7 Court should answer that question "yes." The details of
8 this particular case has been reviewed by two courts on
9 an undisputed record, and we think they got it right.
10 JUSTICE GINSBURG: Mr. Perry, you said that
11 the -- the objective is to get the copyright holder to
12 sue early on and not to wait, but if the -- if no
13 profits had been made in that early period and it would
14 cost the plaintiff more to mount a lawsuit than the
15 plaintiff could possibly receive in damages, why shouldn't
16 the plaintiff, who has a copyright that's going to run a
17 long, long time, sue?
18 If things stay the same, no suit will ever
19 be brought. Why is it unreasonable for the plaintiff to
20 see if the copyright is worth anything?
21 MR. PERRY: Justice Ginsburg, that's why
22 Congress put in the statutory damages and also an
23 attorneys' fee provision, so that even if there are no
24 profits, and many works of authorship never become
25 profitable, there is an incentive -- an economic

1 incentive for the rights asserter to come forward to
2 court, and clarify those rights, because these are
3 valuable assets.
4 Even money-losing films, books, songs, and
5 so forth are traded, are financed, are bought and sold,
6 either individually or as part of companies. And the
7 entire economic system benefits from greater clarity and
8 earlier resolution of rights.
9 And I should -- I should point out in this
10 respect my clients -- the studios generally own many,
11 many copyrights. We are on both sides of the "v." This
12 is not a plaintiff versus defendant --
13 JUSTICE BREYER: I take it, in the example
14 that Justice Ginsburg gave, your position -- tell me if
15 I'm wrong -- is, of course, the defense laches in
16 principle applies, but the defendant will lose because
17 the plaintiff did not wait an unreasonably long time.
18 MR. PERRY: Yes.
19 JUSTICE BREYER: She waited a reasonably
20 long time, for the reason that Justice Ginsburg gave.
21 MR. PERRY: Justice Breyer, thank you. And
22 I entirely agree. There is a distinction --
23 JUSTICE BREYER: I thought you might agree.
24 (Laughter.)
25 MR. PERRY: -- in this case between the

1 availability of laches and the applicability of laches.
2 Our position is that laches is an available defense in
3 every civil action. That's what rule 8(c) says. Rule
4 8(c) has a list of affirmative defenses. It is in
5 there.
6 It may not be a good defense --
7 JUSTICE SCALIA: Well, that may just mean --
8 you know, where it is a defense, it is an affirmative
9 defense that has to be treated the way rule 8(c) says.
10 I don't think that rule 8(c) establishes that it applies
11 in law, as well as in equity, and that's the question I
12 want to ask you.
13 How -- do you -- do you say that -- that
14 laches was a defense available at law before the Federal
15 Rules were enacted? Or do you say that courts continue
16 to have the power to bring it from equity into law after
17 the rules were enacted? And if the latter, why so?
18 MR. PERRY: The latter, Your Honor, for
19 three reasons. First, the Law and Equity Act of 1915
20 authorized the courts to do that. Second, the Rules
21 Enabling Act of 1934 authorized the courts to do that.
22 And third, this Court's historical practice of doing
23 exactly the same thing with tolling in the Irwin case,
24 with unclean hands in the Precision Instruments case,
25 with fraud in the Hazel-Apta case --

1 JUSTICE SCALIA: They had -- they had been
2 used in law before -- before the rules --
3 MR. PERRY: I don't believe unclean hands
4 ever had been before Precision Instruments, Your Honor.
5 And certainly, it is the case that every other equitable
6 defense that this Court has ever looked at applies in
7 law. This Court has never said, in the modern era, that
8 any of the traditionally equitable defenses, and there
9 are eight of them listed in rule 8, is not available in
10 an action that would historically have been
11 brought at law.
12 And by the way, I should footnote here that
13 this is an action in equity. Had she brought this
14 action -- the only relief sought in the prayer is an
15 accounting for profits and an injunction, both of which
16 chancery could have awarded. So that the claim -- that
17 question is hypothetical in this case. This is an
18 equitable case, she seeks equitable remedies, they are
19 subject to equitable defenses.
20 But as a philosophical matter, Justice
21 Scalia, if tolling, laches -- excuse me -- estoppel,
22 waiver, abandonment, unclean hands, fraud all apply in
23 at law --
24 JUSTICE ALITO: If we search -- if we search
25 every Federal -- every reported Federal decision since

1 1938, how many would we find in which the Court
2 recognized the available of laches as a defense to a claim
3 for legal relief?
4 MR. PERRY: In this Court, Your Honor, you
5 would find the Morgan case. You would find the Bay Area
6 Laundry case, which is a MABA case that I believe, under
7 the toll Seventh Amendment analysis, would be viewed as
8 legal because it had no analogue at common law, both of
9 which recognized that, where you have a rolling statute
10 of limitations and an action at law, laches is an
11 available remedy to police the abuses.
12 JUSTICE KAGAN: Is your argument limited to
13 that? Would you say laches is also available when
14 there's no continuing violation or when there's no
15 rolling period?
16 MR. PERRY: Yes, Your Honor, absolutely. It
17 is -- it is a complementary or supplementary doctrine
18 that has always traveled together. It becomes more
19 apparent and, frankly, more useful in the rolling
20 statute of limitations context.
21 As the Morgan court made clear, it is that
22 kind of cases where, because of the structural feature
23 of the statute, the action may be temporally very
24 divorced or separated from the events that are being
25 disputed, that laches may have its role to play.

1 JUSTICE KENNEDY: Can you tell us, in
2 response to Justice Alito's second part of his question
3 about the other cases -- you talked about the two
4 Supreme Court cases. You said, if you read every
5 Federal decision, since the beginning of time --
6 MR. PERRY: Yes, Your Honor. So in the copyright
7 context, every court of appeals to have considered the
8 question has applied it to copyright cases, including
9 legal claims, except the Fourth Circuit, although the
10 Fourth Circuit has a subsequent trademark case that
11 calls that, we believe, into question.
12 Outside of the copyright context, in the
13 patent context, the Federal Circuit in the Ackerman
14 case, I cited, clearly applies it. And in other
15 contexts, there are some -- it doesn't come up all that
16 often.
17 We cited several cases, the Teamsters case
18 and the Maxim case from the Seventh Circuit, which has
19 the most developed jurisprudence, both of which, in very
20 detailed analyses by Judge Posner, which addressed all
21 of the circuit court authorities pretty much, conclude
22 that laches applies to actions in equity as well as
23 actions at law, if that old distinction makes sense.
24 And, again, I would point the Court back as
25 well to the Gulfstream case, where this Court, the last

1 time it looked at the Law and Equity Act of 1915,
2 determined that, for purposes of establishing appellate
3 jurisdiction, the old law-equity divide was, quote,
4 "infelicitous" and not necessary any more because of the
5 merger and that that was no longer necessary.
6 JUSTICE KENNEDY: Assume -- assume we have
7 an interest, just assume we do, in not having too many
8 suits simply to protect your rights in -- in cases where
9 the copyright may not be worth much or may not be
10 well-established. Which rule, yours or the
11 Petitioner's, is more helpful in this regard?
12 MR. PERRY: So our rule, the availability of
13 laches, has been the rule since the 19th century. This
14 Court recognized laches in the Callahan case, in a
15 copyright case, and it has been applied in every circuit
16 except the Fourth, which doesn't get many copyright
17 cases. 90 plus percent of all copyright cases, Your
18 Honor, are filed in the Second Circuit or the Ninth
19 Circuit.
20 Both of those --
21 JUSTICE SOTOMAYOR: That is true about the
22 Ninth Circuit, but between the Second, Sixth, Tenth, and
23 Eleventh, I always -- I thought those circuits announced
24 laches are available, but only in an exceptional
25 circumstance. And I actually don't know how many cases

1 they barred suit -- copyright suit on -- completely on
2 the basis of laches.
3 MR. PERRY: Justice Sotomayor, we agree it's
4 an exceptional circumstance. And this goes back to
5 Justice Breyer's question. There's a difference
6 between --
7 JUSTICE SOTOMAYOR: Just answer. Did you
8 find any case where they actually applied laches?
9 MR. PERRY: Sure. The Second Circuit, in
10 the New Era case, applied to laches to bar an injunction
11 against a Scientologist --
12 JUSTICE SOTOMAYOR: Injunction, but not
13 the suit completely?
14 MR. PERRY: I don't remember, actually.
15 Certainly, the Danjaq case in the Ninth Circuit
16 canvasses this question.
17 JUSTICE SOTOMAYOR: The Ninth Circuit, I
18 know --
19 MR. PERRY: And this Court, of course --
20 JUSTICE KENNEDY: Could you finish answering
21 my question?
22 MR. PERRY: Yes, Your Honor.
23 Justice Kennedy, our rule, the availability of laches,
24 is the status quo. It has been the status quo for more
25 than a 100 years. It has not led to a plethora of

1 litigation. It has not led to a bunch of frivolous
2 suits. One of Petitioner's amici says that laches
3 appears in something like 1 percent of all reported
4 cases as an issue, not even --you know, the central
5 issue.
6 However, if the Court were to change the
7 rule, depart from the status quo, announce for the first
8 time, in its history, that this equitable doctrine is
9 not available in this class of cases or, by the way,
10 Petitioner's rationale is not limited to this case, it's
11 every case, then the studios and other potential
12 defendants would have the economic incentive to bring
13 declaratory actions or contract actions or other
14 preemptive suits to clarify rights, increasing
15 litigation, increasing complexity.
16 It is absolutely undisputed, I would
17 think -- or indisputable at least, that the rule
18 proposed by Petitioner would lead to more litigation.
19 Our rule leads to less.
20 Our rule is what has always has been the
21 law -- you know, our rule goes to this. And,
22 Justice Sotomayor, if I could pick up on the question
23 about outcomes. It is a discretionary doctrine, so some
24 cases bar injunctions; some cases don't.
25 This Court, in the 19th century, the

1 Saxlehner cases, the mineral water cases, barred the
2 injunctions. The McLean liver pill case didn't bar the
3 injunction. That is because the discretionary nature of
4 the doctrine allows flexibility in its application, but
5 it has always been known and understood, particularly in
6 the gold mine cases, and this is just like a gold mine
7 case, like the Patterson case, it barred the
8 action.
9 It said, you can't get damages, and you
10 can't get an injunction. That's the defense we asserted
11 in this case. And, again, the Petitioner did not
12 dispute that in the district court, did not dispute that
13 in the Ninth Circuit, did not dispute that in the cert
14 petition -- you know, that issue we think --
15 JUSTICE SCALIA: Excuse me. Did not dispute
16 what? What?
17 MR. PERRY: That, if laches is available,
18 it bars the entire suit, Your Honor.
19 JUSTICE SCALIA: Okay.
20 JUSTICE KAGAN: Mr. Perry, what troubles me
21 a bit about your argument is I think that the dearth of cases
22 on this is probably explainable by the fact that people
23 just haven't thought that they had a laches defense when
24 a plaintiff brought a suit within a statute of
25 limitations period.

1 And now, if we open this all up, grant it in
2 a statutory context, in which it makes some sense to
3 give people a laches defense, if we open this all up,
4 we'll be seeing motions that nobody ever dreamed of
5 before.
6 MR. PERRY: Your Honor, let me answer in two
7 steps. In copyright cases, this has been a well
8 understood and available defense since Judge Learned
9 Hand's opinion in the Haas case, at least, and gets
10 asserted with some regularity and there's a decision
11 from every Circuit, just about, that hears these kinds
12 of cases, so I think, empirically, I'm not sure that's
13 right.
14 JUSTICE GINSBURG: Why should it be
15 different from the patent case?
16 MR. PERRY: Your Honor, we don't think it
17 should be different than the patent case. We think the
18 same -- the availability should be there.
19 JUSTICE GINSBURG: So you think the Federal
20 circuit's decisions are wrong?
21 MR. PERRY: To the extent it says that
22 there's a categorical bar on applying laches to
23 injunctions, that can't be right. That can't be right
24 after eBay. That was a pre-eBay decision that reflected
25 the Federal circuit's predilection for -- for

1 categorical rules. This Court made clear, in eBay, that
2 all equitable doctrines are discretionary.
3 Justice Kagan, the second answer to your
4 question is this Court wouldn't be announcing it for the first
5 time. This Court has twice looked at this very
6 question, rolling statutes of limitations, in Bay Area
7 Laundry and in Morgan. And in both times, the Court
8 said the statute of limitations rolls forward, and in
9 both times, it said the potential abuse of that is
10 policed by the laches doctrine.
11 JUSTICE SCALIA: But you've said -- I think
12 you've said that -- that it would apply to ordinary
13 statute of limitations. So if you have a six-year
14 statute of limitations and you don't sue until five
15 years after, you're subject to the defense, well, you
16 should have -- should have sued sooner.
17 MR. PERRY: That's correct, Your Honor. And
18 you can -- you can --
19 JUSTICE SCALIA: I -- I share Justice
20 Kagan's reservation about that. Could we limit our
21 opinion just to rolling statutes?
22 MR. PERRY: Your Honor, it's an equitable
23 doctrine, and of course, it can be adjusted. It can
24 also be clarified, though, that within the initial term
25 of statute of limitations, it very rarely will apply.

1 But there will be cases. The Patterson case -- this
2 Court's decision on Patterson is on all fours with this
3 case. And this Court held that laches barred the suit,
4 even though the statute of limitations had not run.
5 The Second Circuit's decision in New Era is
6 an example of a copyright case, where, because the books
7 had already been published and put on the retailers'
8 shelves, the injunctive request that would have required
9 the recall and destruction of those books came too late
10 because the Petitioner had actual knowledge -- the
11 plaintiff had actual knowledge and could have sued
12 earlier.
13 Or you can think of a strategic situation,
14 where you know the key witness is on death's door, and
15 you wait for that witness to keel over before you file
16 suit. Even if you're within the statute, that -- you
17 know, she who seeks equity must do equity. And there
18 will be situations, Justice Scalia, where within that
19 same period -- it will be extraordinary. It will be
20 unusual.
21 But on a rolling statute, it will happen
22 with increasing frequency because, the farther you get
23 away from the events in question, the more likely the
24 prejudice will arise, the evidentiary prejudice and the
25 expectations-based or reliance prejudice, both of which

1 were established on this record, both of which bar this
2 claim, both of which were found by the district court,
3 reviewed by the Ninth Circuit for an abuse of discretion
4 and not found.
5 CHIEF JUSTICE ROBERTS: Does the laches
6 defense bar everything in the future? It is, after all,
7 a rolling statute of limitations.
8 MR. PERRY: Your Honor --
9 CHIEF JUSTICE ROBERTS: To the extent your
10 concern is reliance, okay, wait until the reliance is --
11 you know, off -- off the table. Then you've got three
12 years to go ahead.
13 MR. PERRY: We -- we think it bars her claim
14 against MGM to renegotiate this contract because of
15 those unique sequence of events. If there were no
16 question about a past historical act, it may be that an
17 ongoing infringement, particularly a willful
18 infringement, which comes up often, the courts have said
19 that past stuff isn't going to be barred, but future --
20 or, excuse me, past remedies are barred, but future
21 injunctions may not be.
22 Effectively, this Court said that in McLean
23 and Menendez, the trademark cases, where the liability
24 for trademark infringement -- willful trademark
25 infringement was clear. Here, we have a finding --

1 CHIEF JUSTICE ROBERTS: Well, not just
2 injunctions. I mean, let's say they -- you know, they
3 released the Blu-ray version or whatever, and so, in a
4 particular two-year period, you make a lot of money, and
5 the suit should have been brought before that. Well,
6 starting when the sales go down, you still have a
7 three-year period where you're making the routine
8 amount.
9 MR. PERRY: So here's where film is
10 different. She doesn't have any right in the film, to
11 be clear. She claims a right in the screenplay, and she
12 claims the film as a derivative work. The re-release of
13 the film, on film, on television, VHS, Laserdisc, DVD
14 Blu-ray, whatever gets them in, it’s the same alleged
15 infringement. There's no distinction for this claim.
16 There are other copyright claims, Mr. Chief Justice, but
17 that does matter very much, the format and so forth.
18 For this claim, it makes no difference
19 whatsoever. It is just like the Morgan case, a repeat
20 act of discrimination by the same supervisor over and
21 over and over again. And that is why in these
22 circumstances --
23 JUSTICE SOTOMAYOR: How about your creation
24 of another derivative work?
25 MR. PERRY: Your Honor, I believe if -- if

1 these studios -- well, first of all, if somebody else
2 recreated a different derivative work, this case doesn't
3 bar her at all. She has all of her rights, and she can
4 assert them against the world.
5 Laches is a personal doctrine against two
6 litigants. It's like an estoppel. Okay. It is an
7 estoppel. Second --
8 CHIEF JUSTICE ROBERTS: Briefly.
9 MR. PERRY: Thank you, Your Honor.
10 Second, if the studios -- these studios were
11 to prepare a new work, a remake or a sequel, we would
12 not take the position that laches applies there because
13 it is a new work, as opposed to -- and my answer to
14 Mr. Chief Justice -- the repeat release of the same
15 work.
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Bibas, five minutes.
18 REBUTTAL ARGUMENT OF STEPHANOS BIBAS
19 ON BEHALF OF THE PETITIONER
20 MR. BIBAS: Thank you, Your Honor.
21 Five points. First, Justice Sotomayor was
22 entirely right that Holmberg, Russell, Mack, and Merck,
23 just four years ago, make this settled law. There is a
24 reason Justice Kagan says that we can't see laches in
25 cases like this.

1 We don't see it foreclosing ongoing and
2 future wrongs. We've never seen laches used to measure
3 the delay before the wrong occurred to foreclose ongoing
4 and future claims. Laches is normally about the delay
5 between the wrong and the suit.
6 And this invented category of rolling
7 statutes of limitations -- this Court in Klehr carefully
8 distinguished separately accruing discrete wrongs within
9 a limitations period from continuing violations that
10 reach back beyond the limitations period to claim
11 damages beyond that.
12 When my friend says we could have brought
13 this exact same suit in 1991, he is absolutely
14 incorrect. If they had stopped infringing in 2005, the
15 entire statutory penalty for my client would have been
16 no recovery from 1991 until 2005.
17 Second, the only two precedents my friend
18 can rely upon from this court, in the face of a wall of
19 precedent noted by Justice Sotomayor, are Morgan and Bay
20 Area Laundry. Bay Area Laundry had a statutory
21 provision, 29 USC 1399(b)(1), that required an employer
22 to bring claims as soon as practical.
23 The only context in which there was an aside
24 in that case, not even an application or holding, was
25 saying that as soon as practical is a laches-like

1 doctrine.

2 The only case that looks remotely close that

3 my friend cites in his brief is the Morgan case. And

4 Morgan is completely distinguishable for two reasons.

5 The first is Morgan involved bootstrapping damages from

6 beyond the limitations period, claiming damages from

7 before the 180 or 300-day filing period. We claim no

8 damages before 2006.

9 Second, my friend is absolutely incorrect in

10 saying there was a statute of limitations in Morgan.

11 Title 7 contains no statute of limitations. It contains

12 a filing timeliness requirement. One of the pillars of

13 this Court's decision in Morgan is you can reach back

14 for damages for two years, as shown by the back pay

15 provision.

16 Since we don't have a limit on damages, we

17 might possibly consider a limit -- a laches-like

18 limitation in a future case. That was not the holding.

19 It was not briefed and argued, but there was a mention

20 of it, so Morgan was not within the statute of

21 limitations. There was no statute of limitations.

22 And when this Court interpreted it in

23 Ledbetter, it understood Morgan is about continuing

24 violations rescuing untimely claims for untimely damages

25 before limitations period.

1 The lower courts my friend refers to, by the
2 way, he and I have jointly not found a single case that
3 was entirely barred in the Second, Sixth, Tenth, or
4 Eleventh Circuits.
5 In the cases that adopt a -- the circuits
6 that adopt a rare case standard, in theory, leaving the
7 door open, they have not cited and we have not found in
8 the Sixth, Tenth, or Eleventh Circuit a single case that
9 found that standard met as to damages or injunctive
10 relief.
11 And, yes, we do claim damages. Our
12 complaint, Joint Appendix 30 claims damages. Joint
13 Appendix 34, the prayer for relief is phrased in terms
14 of damages, not an accounting for profits.
15 Third, Justice -- oh, and by the way, the
16 Posner opinion that was cited said that's only because
17 there's no statutory limitations period. There's no
18 congressional separation of powers problem because,
19 under the statute interpreted in that Posner opinion,
20 there was no statutory limitation period by Congress.
21 Third, Justice Kennedy's point about
22 estoppel as a cousin. It is not a twin. First, you can
23 have an estoppel after a one-week delay. Estoppel has
24 no element requiring delay. Laches requires a long
25 delay.

1 Estoppel requires affirmative, intentional
2 misconduct causing a loss. I'd point out those elements
3 are substantially more stringent. Moreover, estoppel,
4 like tolling and discovery rule, were settled law as of
5 1957. Tolling and discovery rule were cited in the
6 legislative history by the legal advisor to the
7 Copyright Office.
8 But the Holmberg case that was cited to that
9 court said very different rule is the background rule as
10 to laches, no laches within the congressional law
11 period.
12 Finally, let me point out that, because
13 estoppel was settled, it remains available to catch the
14 worst cases of prejudice. It remains available for the
15 manipulative scenarios outlined by my friend.
16 Fourth point, uncertainty. I think it's
17 quite salient that Justice Kagan pointed out that, if we
18 were to recognize laches here, for the first time -- for
19 the first time within the congressional statute of
20 limitations, we'd open a whole new field of litigation
21 over laches.
22 When do I file? This Court, just a week
23 ago, in the Ray Haluch Gravel opinion said timeliness
24 rules need to be clearer, simple, predictable. Parties
25 need to know when to file.

1 We frequently see plaintiffs filing on or
2 shortly before the day the limitation period expires.
3 If this Court were to cloud that, then there'd be a rush
4 of preemptive litigation coming into court.
5 Moreover, I think Justice Breyer's point is
6 quite right. You shouldn't have to file 15 damages
7 suits, one after another. From Blackstone to Story to
8 the Marshall Court, one of the principles of equity was
9 you don't have to keep filing injunctive relief.
10 Thank you.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.
13 (Whereupon, at 12:08 p.m., the case in the
14 above-entitled matter was submitted.)
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