No. 22-1078

In The Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC., AND ARTIST PUBLISHING GROUP, LLC, PETITIONERS,
v.
SHERMAN NEALY AND MUSIC SPECIALISTS, INC., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SOUTHWESTERN LAW STUDENT KRYSTINA CAVAZOS AND SOUTHWESTERN LAW ENTERTAINMENT AND THE ARTS LEGAL CLINIC FELLOW BRYNN BODAIR, AND PROFESSORS ORLY RAVID, ROBERT C. LIND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U. S. C. 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners. Orly Ravid is an associate professor at Southwestern Law School and the Director of the Biederman Entertainment and Media Law Institute. Robert C. Lind is a professor emeritus at Southwestern Law School and the author of numerous treatises on copyright and entertainment law. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the Journal of International Media & Entertainment Law, published by the Biederman Institute in cooperation with the American Bar Association. Amicus Brynn Bodair is a practicing entertainment attorney and fellow with the Entertainment and the Arts Legal Clinic. Amicus Krystina Cavazos is an upper-division J.D. candidate at Southwestern Law School with an extensive academic and professional interest in entertainment and copyright law. Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the cost of preparing this brief. (The school is not a signatory to the brief, and the views expressed here are those of the *amici curiae.)* Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

correct and consistent interpretation of copyright law. Amici share a strong interest in there being clarity and certainty in the U.S. Circuit Courts of Appeals' application of the Copyright Act's statute of limitations 507(b) following the Eleventh Circuit's decision in *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023).

SUMMARY OF THE ARGUMENT

In support of Warner Chappell Music, this brief urges this Court to prohibit lower courts from awarding damages beyond the statutory three-year period allotted in Section 507(b) of the Copyright Act. Lower courts' application of the discovery accrual rule to damages awards under Section 507(b) of the Copyright Act flouts the separation of powers and has resulted in confusion.

Separation of powers is a bedrock principle of the United States Constitution. *Bowsher v. Synar*, 478 U.S. 714, 720-22 (1986) (stating that the constitutionally imposed separation of powers was deliberately structured to assure full, vigorous, and open debate on the great issues affecting the people). Judicial action should not overstep the legislative powers of elected officials, especially where Congress' legislative intentions are clear. THE FEDERALIST NO. 47 (James Madison). Congress has explicitly included a three-year statute of limitations in Section 507(b) of the Copyright Act; the legislative history outlines the foundational discussions and reasoning that led to Congress' determination. S. Rep. No. 1014, 85th Cong., 1st Sess. 2 (1957). Straying from the plain text of the statute and Congress' stated intentions would

contravene the Constitution's separation of powers, amounting to judicial legislative overriding.

In a copyright and a patent case, this Court has unequivocally upheld the principle of separation of powers, expressly stating that the application of laches when Congress has enacted a statute of limitations would be legislative overriding. *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 580 U.S. 328, 335 (2017) (a patent case citing the copyright case *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680 (2014)). When Congress enacts a statute of limitations, it is a value judgment, balancing the interests of both parties involved in the claim. *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019).

Lower courts have been dramatically inconsistent in their rationale for applying the discovery rule to copyright infringement claims. *See* page 11 *infra*. The application of the discovery rule in determining damages exacerbates ever-growing unpredictability and inconsistencies across the lower courts, undermining Section 507(b) of the Copyright Act and Congress' stated purpose of having a clear statute of limitations.

ARGUMENT

I. JUDICIAL APPLICATION OF THE DISCOVERY ACCRUAL RULE IN 17 U.S.C. SECTION 507(B) IS CONTRARY TO CONGRESS' INTENT AND AN OVERREACH OF THIS COURT'S POWER.

A. SEPARATION OF POWERS IS A BEDROCK PRINCIPLE OF THIS COUNTRY.

Democratic government requires separation of powers for "the accumulation of all powers, legislative, executive, and judiciary, in the hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 at 220 (James Madison) (Fall River Press ed., 2017). The United States established certain limits not to be transcended by the different departments of the government. *Marbury v. Madison*, 5 U.S. 137, 176 (1803); *Bowsher*, 478 U.S. at 721, 725. (stating that "the United States Constitution sought to divide the delegated powers of the Federal Government into three defined categories" and the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question"). Article 1 of The United States Constitution provides that the legislative branch possesses the primary power to create the laws of this country. U.S. Const. art. 1, § 1. Limitations on the Court's power prevent the unelected judiciary from intruding upon the power of the legislative branch, and fears of such encroachment

is illustrated by The Constitutional Convention of 1787's repeated rejections of the Council of Revision that solidified the complete separations of the courts from the legislature.[2]

The Honorable Justice Harlan warned against "legislative enactments by means alone of judicial construction," emphasizing the contention that the federal judiciary has assumed functions beyond its courtroom and entered the legislature's department of government. *Standard Oil Co. v. United States*, 221 U.S. 1, 105-06 (1911) (Harlan, J., concurring in part and dissenting in part). Recently, this Court acknowledged the necessity of maintaining separation of powers as well as the cautious emergence of judicial review and its maturation throughout the founding era. *Moore v. Harper*, 600 U.S. 1, 18-20 (2023) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

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[2] The Constitutional Convention of 1787 proposed a Council of Revision, consisting of the President and members of the judiciary, to review and potentially veto federal laws prior to effectiveness. The Constitutional Convention rejected such Counsel to guard against the judiciary's participation in the legislative process as such participation would result in unbounded power. *See* Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U.PA. J. Const. L. 161, 167-169 (2011) (citing James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 Univ. Chi. L. Rev. 235, 235 (1989) ("The history of [the Council of Revision] proposal illustrates how the Framers, faced with a model of judicial involvement in the lawmaking process, chose instead a judiciary that took no part in the creation of laws. In so doing, the Framers effectively chose to preclude the courts from deciding matters of public policy and to create a special place for the courts in the separation of powers scheme.").

B. CONGRESS ENACTED A STATUTE OF LIMITATIONS TO CREATE A UNIFORM TIME PERIOD FOR PLAINTIFFS TO INITIATE COPYRIGHT INFRINGEMENT CLAIMS.

The enactment of the Copyright Act's statute of limitations was not a cursory decision by Congress. Congress had witnessed the judicial inconsistency that occurred when courts applied state statutes of limitations to copyright infringement claims. S. Rep No. 1014, at 2. Recognizing that the different approaches promoted forum shopping, Congress undertook a diligent inquiry into the appropriate time period for a statute of limitations that balanced the infringer's desire for a shorter statutory period and the injured party's desire for a longer one. *Id.*

The House Judiciary Committee hearings surveyed various interested parties, including the "Copyright Office, representatives of the American Bar Association, committee on copyright law provisions, and also from interested industrial associations." *Id.* Congress analyzed the various state statutes of limitations which ranged anywhere from one to eight years. *Id.* Through these discussions it was collectively agreed upon that the three-year time period offered the "best balance" for copyright infringement claims to be brought as it provided adequate time for an injured party to commence his action. *Id.*

In addition to the interests of the parties, Congress deliberated on the very nature of copyright itself, observing that copyright infringement is a public act

and that an injured party receives "reasonably prompt notice [of] or can easily ascertain any infringement of his right." *Id.* Notably, Congress determined that injured parties could easily discover infringement before the advent of the Internet. *Id.* Given contemporary technological advancements such as reverse image searching, Internet "crawling," and music recognition services, copyright owners more readily discover infringement of their intellectual property. For example, a photographer or graphic designer can easily utilize Google's reverse image search functionality, which allows one to identify if their specific photograph, graphic design, or other image appears anywhere on the Internet. One follows the same process as searching for information based on text prompts, except instead of typing a text query using keywords, one pastes an image into the search bar, and if it appears on the Internet, the search result will reveal the infringement. *See generally Reverse Image Search: Verifying photos*, Google News Initiative https://newsinitiative.withgoogle.com/resources/trainings/fundamentals/reverse-image-search-verifying-photos (last visited Nov. 26, 2023) Also, copyright creators utilize third-party services that expansively crawl the Internet in search of copyright infringements. *Minden Pictures, Inc. v. Complex Media, Inc.*, No. 22-CV-4069 (RA), 2023 WL 2648027, at *2 (S.D.N.Y Mar. 27, 2023) (hereinafter "*Complex Media*"). Similarly, with respect to music, using AHA Music, a musician can use the service to see if their musical work appears online. *Identifying Songs Online*, AHA Music, https://www.aha-music.com/identify-songs-music-recognition-online (last visited Nov. 26, 2023). Given the ubiquity of the

Internet and the ever-developing tools, application of the discovery rule to copyright infringement cases is gratuitous. A copyright holder can easily use these technologies to discover infringements. Therefore, application of the discovery accrual rule unnecessarily overrides the uniform time period that the statute of limitations was intended to create.

C. THIS COURT HAS REFUSED TO ENGAGE IN "LEGISLATIVE OVERRIDING," AS SUCH OVERREACH WOULD DISTURB THE SEPARATION OF POWERS.

1. THIS COURT HAS ADHERED TO THE PRINCIPLE OF SEPARATION OF POWERS WHEN INTERPRETING PROVISIONS OF THE COPYRIGHT ACT.

The separation of powers principle was instrumental in this Court's *Petrella v. Metro-Goldwyn-Mayer, Inc.* decision when it was asked to determine the applicability of the equitable doctrine of laches to bar claims for infringing acts that occurred within the Copyright Act's statute of limitations. *Petrella*, 572 U.S. at 676. The Court stated that the doctrine of laches was only applied in situations where Congress had not enacted a statute of limitations because there was no longer a gap to fill. *SCA Hygiene Products*, 580 U.S. at. 333 (quoting *Petrella* at 680-81. This Court explicitly pointed out that the expansive application of laches would have a "legislation-overriding" effect which it had never endorsed. *Petrella*, 572 U.S. at 680. Furthermore, the Court noted that allowing "judges to set a time limit other than the one Congress prescribed…would tug against

the uniformity Congress sought to achieve when it enacted [Section] 507(b)." *Id.* at 681.

The Court recently reiterated the importance of the separation of powers principle in a recent opinion when it was tasked with determining whether laches was applicable to the Patent Act's statute of limitations. *SCA Hygiene Products*, 580 U.S. at 333. The Court in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC* noted that *Petrella's* holding "rested on both separation-of-powers principles and the traditional role of laches in equity." *Id.* The Court proceeded to apply the reasoning from *Petrella* to the Patent Act, finding that the equitable doctrine of laches was not applicable to the statute of limitations, which barred plaintiffs from recovering retrospective damages prior to six years before filing the suit. *Id.* at 336.

This Court routinely adheres to Congress' authorship. In fact, this Court recently denied challenges to statutory requirements under 17 U.S.C. § 411(a) (i.e., the requirement that registration of a creative work must precede an infringement suit). *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (holding that registration is a requisite action to bring forth a claim for copyright infringement despite any administrative delay at the Copyright Office that could potentially impact statute of limitations concerns). Affirming fidelity to Congressional intent, this Court indicated that it would not support an expansive or contrary reading of 17 U.S.C. § 411(a) where Congress had enacted a rule, extensively contemplated exceptions, and resisted efforts to change this rule. *Id.* at 885-86.

Inconvenience arising from the implementation of the statute "does not allow this Court to revise the congressionally composed text of § 411(a)." *Id.* at 892.[3]

2. THIS COURT HAS REFUSED TO APPLY AN EXPANSIVE DISCOVERY RULE IN OTHER AREAS OF THE LAW.

This Court has refused to apply a general discovery rule to statute of limitations in other areas of law, finding that legislation including statute of limitations magnifies Congress' intent to preclude judicial invocation of a discovery rule. *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (holding that the text and structure of 15 U.S.C § 1681 manifested Congress' intent to preclude judicial implication of a discovery rule). In *Rotkiske v. Klemm* this Court refused to apply an "expansive approach" to the discovery rule because it is a "fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the court." *Rotkiske*, 140 S. Ct. at 360-61. The Court specifically noted that Congress has enacted statutes that begin at discovery, and it is not the Court's place to second guess the decision of Congress. *Id.* at 361. Additionally, the Court discussed how the length of the statute of limitations "reflects a value judgment" that balanced the interests of protecting valid claims and prohibiting the persecution of stale ones. *Id.* This is exactly the type

[3] For clarity, "inconvenience" refers to the statutory scheme's failures that Congress likely did not envision (i.e., the increase in registration processing times from weeks to several months as a result of staffing and budgetary shortages) but is better suited than courts to cure. *Fourth Est. Pub. Benefit Corp.*, 139 S. Ct. at 892.

of value judgment that Congress made when enacting the three-year statute of limitations for the Copyright Act when it balanced the interests of plaintiffs and defendants. S. Rep No. 1014, at 2. It is the job of this Court to "simply enforce the value judgments made by Congress." *Rotkiske*, 140 S. Ct. at 361. Should Congress wish to change the statute of limitations, it is within Congress' powers, and not this Court's to do so. *Id.*

II. COURTS, WHEN APPLYING THE DISCOVERY ACCRUAL RULE, PROLIFERATE INCONSISTENT HOLDINGS.

The inconsistencies surrounding the discovery rule start with varying justifications for its application. *Compare e.g. Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994) (applying a discovery rule specifically intended to address fraudulent concealment as discussed in *Wood v. Santa Barbara Chambers of Com., Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980)) (where the court applied the fraud discovery rule because there was fraudulent concealment), *with William A. Graham Co. v. Haughey*, 568 F.3d 425, 433–37 (3d Cir. 2009) (interpreting that Congress' use of the word "accrue" in Section 507(b) instead of "arose" as used in Section 507(a) indicated that Congress intended the words to have different meanings and, consequently, the discovery rule applied).

Furthermore, courts are divided about the discovery accrual rule's inquiry of whether a plaintiff "discovered or reasonably should have discovered" a copyright infringement occurred. *See e.g., Starz Ent.,*

LLC v. MGM Domestic Television Distrib., 39 F.4th 1236, 1241 (9th Cir. 2022). Accordingly, even if the discovery accrual rule may extend damages beyond the statutory three-year framework, lower courts have created a variety of approaches to determine when such accrual may begin. For example, while some decisions in the Southern District of New York consider a plaintiff's savviness, ability to enforce their copyright(s), and aptitude to discover copyright infringement(s), other courts vehemently reject this rationale, misconstruing a plaintiff's ability to enforce their copyright(s) as an improperly imposed duty to enforce one's copyright. *Compare Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019) (hereinafter "*Buzzfeed, Inc.*") (granting the defendant's motion to dismiss and holding that the plaintiff, who had filed 36 similar lawsuits, if exercising due diligence, should have discovered that its copyright was violated); *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027, at *2[4] (granting the defendant's motion to dismiss and stating that the plaintiff, who had filed 100 similar lawsuits, if exercising due diligence, should have discovered that its copyright was violated); *Lixenberg v. Complex Media, Inc.*, No. 22-CV-354 (RA), 2023 WL 144663, at *3 (S.D.N.Y Jan. 10, 2023) (granting the defendant's motion to dismiss because the plaintiff, who had filed 20 lawsuits within an eight-year period, "should have known" of the defendant's infringement if exercising "reasonable due diligence"); *and Michael Grecco Prods. v. RADesign, Inc.*, No. 21-CV-8381 (RA), 2023 WL

[4] Unpublished cases are cited herein not for their precedential value, but rather as examples of significantly inconsistent results in the lower courts.

4106162, at *1, *3 (S.D.N.Y June 20, 2023) (granting the defendant's motion to dismiss and finding that the plaintiff, who "actively searches" for infringements, should have known of the defendant's copyright infringement) *with Hirsch v. Rehs Galleries, Inc.*, No. 18-CV-11864 (VSB), 2020 WL 917213, at *2, *9-10 (S.D.N.Y Feb. 26, 2020) (rejecting the defendant's argument in its motion to dismiss that the plaintiff "should have known" of the defendant's copyright infringement because the plaintiff had hired a firm to search for infringing conduct); *and Parisienne v. Scripps Media, Inc.*, No. 19 Civ. 8612 (ER), 2021 WL 3668084, at *1, *12 (S.D.N.Y Aug. 17, 2021) (denying the defendant's motion to dismiss and stating that plaintiffs do not have a general duty to police the Internet for infringements).

Central District of California decisions further highlight the courts' inconsistencies as several cases either fail to acknowledge the plaintiff's industry experience, practical knowledge and shrewdness, or dictate that such questions of fact should not be determined at the motion to dismiss stage. *See Stokes v. Honeydu, Inc.*, No. CV 22-5598-DMG (RAOx), 2023 WL 2628685, at *1, *4 (C.D. Cal. Feb. 9, 2023) (denying the defendant's motion to dismiss and stating that the reasonableness of discovering copyright infringement is a question of fact); *Minden Pictures, Inc. v. Excitant Grp., LLC*, No. CV 20-08146 PA (JPRx), 2020 WL 8025311, at *8 (C.D. Cal Dec. 14, 2020) (denying the defendant's motion to dismiss because, despite the plaintiff's use of a copyright enforcement service, reasonableness of discovering copyright infringement is a question of fact that cannot be decided on a motion to dismiss); *Mavrix*

Photo, Inc. v. Rant Media Network, LLC, No. CV 19-7270-DMG (AFMx), 2020 WL 8028098, at *3 (C.D. Cal. Nov. 2, 2020) (noting that constructive notice of copyright violations is not solely dependent on the plaintiff's use of Internet sourcing services); *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 510 F. Supp. 3d 878, 889 (C.D. Cal. 2021) *aff'd* 39 F.4th 1236 (9th Cir. 2022) (denying the defendant's motion to dismiss and distinguishing this plaintiff as less litigious than Minden). Reigning in the lower courts' applications of the discovery accrual rule to be more compatible with Congress' intent will remedy divergent outcomes among the lower courts.

A. THE *MINDEN* LINE OF CASES HINGE ON WHETHER A PLAINTIFF "KNEW OR SHOULD HAVE KNOWN" THAT A COPYRIGHT INFRINGEMENT OCCURRED.

In *Minden Pictures, Inc. v. Complex Media, Inc.,* which involved a photography licensing agency plaintiff and an entertainment media company defendant, the plaintiff registered its images with the Copyright Office, engaged technology companies that detect online infringement through "crawling the [I]nternet," and frequently litigated against purported copyright infringers. *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027 at *2. The Court granted the defendant's motion to dismiss, stating that a reasonable copyright holder, in plaintiff's position and exercising due diligence, should have discovered that its copyright was violated. *Id.* at *6. The court noted that *Complex Media* is analogous to the plaintiff's previous suit in which it argued that, despite the defendant's infringements occurring

between 2011 and 2014, the plaintiff "had no reason prior to discovery [in 2017] to know of Defendant's unauthorized uses." *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027 at *3 (citing *Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d at 466). Like *Minden Pictures, Inc. v. Buzzfeed, Inc.* here, the Southern District of New York yet again emphasized that the plaintiff was a seasoned litigator who had filed more than 100 lawsuits in connection with its copyrighted works. *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027 at *1. Thus, the Southern District of New York constructively considered a plaintiff's savviness and ability to enforce its copyright. *Id.*

Complex Media and *Buzzfeed, Inc.* are grounded in the reality of Americans' access to technology, protective measures readily available online, and the recent influx of copyright claims. *See Say goodbye to copyright infringement,* Red Points https://www.redpoints.com/usecase/copyright-infringement-protection/ (last visited Nov. 27, 2023); *Just the Facts: Intellectual Property Cases – Patent, Copyright, and Trademark*, United States Courts (Feb. 13, 2020), https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark (stating that copyright case filings started to rise drastically in 2012 and varied over several years until reaching a new high in 2018). Today, most copyright owners are astute Internet users as they utilize emerging technologies to create and register their works with the copyright office online as well as enforce their rights. *See Registering a Work*, Copyright.gov

https://www.copyright.gov/help/faq/faq-register.html#online (last visited Nov. 27, 2023); Katherine Brooks, *7 Contemporary Artists Engaging With Tech Culture*, Huffpost (Oct. 29, 2015, 10:11 AM EDT), https://www.huffpost.com/entry/artists-engaging-with-technology_n_5632109ee4b0c66bae5b12fb (describing copyright owners who generate their artwork with technology tools and signifying their technological savviness); Oxylabs, https://oxylabs.io/solutions/brand-protection-industry/copyright-infringement (last visited Nov. 27, 2023) (informing users of software that protects against copyright infringement). Accessible and widespread, Americans rely on the Internet to facilitate the enforcement and protection of their rights. *See generally Internet/Broadband Fact Sheet*, Pew Research Center (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/; *Say goodbye to copyright infringement*, *supra*; Ani Petrosyan, *United States Internet Penetration 2000-2023*, Statista (Feb. 20, 2023), https://www.statista.com/statistics/209117/us-internet-penetration/#:~:text=As%20of%202023%2C%20approximately%2092,internet%20users%20in%20the%20country (Stating that as of 2023, approximately 92 percent of individuals in the United States accessed the Internet; The United States is one of the biggest online markets worldwide, and in 2022 there were nearly 299 million Internet users in the country).

Easily accessed tools, such as reverse image search engines and music recognition technologies, only bolster a copyright plaintiff's ability to discover

infringement when exercising due diligence. *See generally Reverse Image Search: Verifying photos*, *supra*; *Identifying Songs Online*, *supra*. In fact, there is a recent rise in copyright infringement cases. *Just the Facts: Intellectual Property Cases – Patent, Copyright, and Trademark*, *supra*. Courts are wary of this influx and have commented on the increasing risk of 'copyright trolling' in light of the available technologies. *See Oppenheimer v. ACL LLC*, No. 3:19-CV-00024-GCM, 2021 WL 3667123, at *1 (W.D.N.C. Aug. 18, 2021) (citing *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (7th Cir. 2017). Further, the fact that ten plaintiffs are responsible for 50% of copyright cases filed in the last three years illustrates the ever-growing shrewdness of copyright plaintiffs. *See* Aaron Moss, *Serial Copyright Plaintiffs Beware: The Discovery Rule May Not Excuse Late-Filed Infringement Claims Brought By "Seasoned Litigators."*, Copyrightlately (Apr. 17, 2023), https://copyrightlately.com/copyright-frequent-flyer-statute-of-limitations-discovery-rule/. *Lixenberg v. Complex Media, Inc.* echoes the courts' awareness in the *Minden* cases of the current legal and technological landscapes, holding that the relative sophistication of plaintiffs renders them ineligible to rely on the discovery rule to resurrect time-barred infringement claims. *See Lixenberg*, 2023 WL 144663 at *3. (holding that where the plaintiff had filed nearly 20 lawsuits, including two related to infringement of the same photograph at issue, that it should have discovered the alleged infringement within the statute of limitations).

B. EVEN COURTS IN THE SOUTHERN DISTRICT OF NEW YORK DO NOT UNIFORMLY ACCEPT THE *MINDEN* RATIONALE.

Despite the Southern District of New York's potpourri approach to applying the rationale of the *Minden* cases, the Second Circuit remains silent. *See Michael Grecco Prods.*, 2023 WL 4106162 at *7-8. In *Parisienne v. Scripps Media, Inc.*, the Southern District of New York reasoned that a plaintiff "does not have a general duty to police the [I]nternet for infringements" of its copyrighted works. *Parisienne*, 2021 WL 3668084 at *4. The court relayed this opinion even though a highly sophisticated and experienced law firm, which specialized in identifying and bringing copyright infringement claims, represented the plaintiff. *Id.* In *Hirsch v. Rehs Galleries, Inc.*, the Court rejected the argument that a plaintiff who had previously discovered infringement of his photographs and had hired a firm that "specializes in searching the [I]nternet for infringing conduct," should have discovered infringing activity within the three-year statute of limitations. *Hirsch*, 2020 WL 917213, at *5. Furthermore, the judge stated, "I have considered and rejected this argument before, as have other judges in this district" where the defendant argued that the plaintiff had a "duty to police the [I]nternet to discover [the infringing] use of his photograph." *Id.* (citing *PK Music Performance, Inc. v. Justin Timberlake*, No. 16-CV-1215 (VSB), 2018 WL 4759737 at *8 (S.D.N.Y. Sep. 30, 2018).

The *Parisienne* and *Hirsch* cases are not representative of the Southern District of New York; confusion persists as the court seemingly aligns with *Buzzfeed, Inc.* in *Lixenberg* and *Grecco.* In *Lixenberg*, the Court's rationale aligned with *Buzzfeed, Inc.* as it held that the plaintiff, a professional photographer who had previously filed 20 lawsuits within an eight-year period, should have discovered the alleged infringement within the statute of limitations if exercising reasonable due diligence. *See Lixenberg,* 2023 WL 144663 at *3, *5. Moreover, in *Grecco*, the Court again found that plaintiff's relative sophistication as a litigator impacted its decision that Grecco should have discovered, with the exercise of due diligence, that infringements of his copyrighted works were posted within the statute of limitations for the plaintiff spent "time and money to actively search for hard-to-detect infringements, and enforces his rights under the Copyright Act." *See Michael Grecco Prods.*, 2023 WL 4106162 at *1, *3. Resultantly, the Southern District of New York presents a varying standard to determine how one's reasonable exercise of due diligence, the impact of their industry experience and ability to enforce their copyright, as well as their use of technology, bears on whether they should have known of defendants' infringements.

C. THE CENTRAL DISTRICT OF CALIFORNIA COURTS HAVE AN ENTIRELY DIFFERENT APPROACH THAN THE SOUTHERN DISTRICT OF NEW YORK.

"Three district courts in the Central District of California also appear to have rejected the *Minden* rule at least in part." *Michael Grecco Prods.*, 2023 WL

4106162 at *3 n. 2. In *Stokes,* where the defendant argued that the plaintiff has "a duty of diligence to investigate potential infringements," the Court did not approve of the defendant's reliance on *Buzzfeed, Inc.* and concluded that the "reasonableness of discovering copyright infringement is generally a question of fact . . . [t]he Court cannot conclude, based on the allegations in the SAC, that Plaintiff's failure to discover the infringement sooner was unreasonable as a matter of law." *Stokes*, 2023 WL 2628685, at *1-2.

In *Minden Pictures, Inc. v. Excitant Grp.*, Minden received different treatment in the Central District of California despite the Southern District of New York's opinion in *Buzzfeed, Inc. Minden Pictures, Inc. v. Excitant Grp., LLC*, 2020 WL 8025311, at *3. Once again, the plaintiff disclosed its use of infringement detecting technologies, noting that it contracted with ImageRights International, Inc. for copyright enforcement services. However, unlike the Southern District of New York's motion to dismiss ruling in favor of the defendant, the Central District of California noted that any "delay in filing the lawsuit" by the plaintiff was a "question of fact" that could not be decided on a motion to dismiss. *Minden Pictures, Inc. v. Excitant Grp.*, 2020 WL 8025311, at *3; *Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d at 464.

Similarly, in *Mavrix Photo, Inc. v. Rant Media Network, LLC,* the Central District of California denied the defendant's motion to dismiss because a finder of fact could conclude that the copyright owner's lack of knowledge of infringement, until it hired an Internet scouring service, was reasonable.

Mavrix Photo, Inc. v. Rant Media, LLC, 2020 WL 8028098, at *3. Furthermore, the Court stated that "other courts have not found a copyright holder had constructive notice of copyright violations solely due to the prior availability of [I]nternet-sourcing services" despite the plaintiff previously filing 40 copyright infringement lawsuits. *Id.*

Moreover, the *Starz* Court differentiated the plaintiffs, finding that Starz, which had only filed one prior lawsuit, "was not quite so litigious" as the "seasoned litigator," Minden. *Starz Ent.,* LLC, 510 F. Supp. 3d at 889-90; (citing *Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d. 461 (S.D.N.Y 2019). Hence, the court denied the defendant's motion to dismiss the plaintiff's copyright infringement claims that the defendant argued were time barred by the Copyright Act's three-year statute of limitations. *Starz Ent.,* LLC, 510 F. Supp. 3d at 880. However, the court failed to acknowledge that, similar to Minden, Starz is an experienced operator in the entertainment business that, as a subscription video provider who licenses and distributes content, can use technology to enforce its copyrights. *Id.* at 881.

Accordingly, the test to determine whether a plaintiff should have known of copyright infringement(s) currently lacks a consistent application. Courts differ in their opinions on this issue. There is no uniformity between the Southern District of New York (which is also internally inconsistent) and the Central District of California. Unanimity lies only in the resounding lack of conformity that this Court has the ability to resolve.

CONCLUSION

The application of a general discovery rule should be substantially restricted and not applied to provide relief for more than three years prior to the filing of a claim. Resolving the inconsistencies in how courts treat more sophisticated plaintiffs would not address the fundamental inconsistency between the discovery rule's application to the Copyright Act and the Act's statutory text.

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