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 SPECIALIST, INC.,

Respondents.

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

Brief of the Recording Industry Association of America as *Amicus Curiae* in Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the Recording Industry Association of America (RIAA).

RIAA is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA's several hundred members—ranging from major American music groups with global reach to artist-owned labels and small businesses—make up the world's most vibrant and innovative music community. RIAA members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. They also are the copyright owners of, or owners of exclusive rights with respect to, sound recordings embodying the performances of some of the most popular and successful recording artists of all time. In support of its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels, and monitors and reviews state and federal laws, regulations, and policies.

The question presented in this case is important to RIAA and its members. Participants in the music industry such as music labels and music publishers regularly enforce their copyrights in the federal courts. At the same time, those participants are regularly subject to suit by others asserting copyright violations.

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[1] Pursuant to Supreme Court Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The Copyright Act requires that a civil action for infringement be "commenced within three years after the claim accrued." 17 U.S.C. 507(b). As a result of recent technological developments, however, copyright infringement can now sometimes happen in a figurative black box, without any possible way to detect it in that limited amount of time.

This case does not directly present a question about equitable tolling of the three-year limitations period in Section 507(b), as respondents have forfeited that issue. But equitable tolling is important to address "black box" copyright infringement situations—for instance, situations in which copying of protected works is carried out by a computer system, such as a generative artificial-intelligence system, that simply uses those works as grist for content creation without ever giving any sign that copying has occurred or disclosing which works have been copied. Accordingly, this Court should make clear that equitable tolling, which is appropriate only in extraordinary circumstances and is distinct from the discovery rule, applies to Section 507(b)'s limitations period in the context of "black box" copyright infringement that is undetectable as a practical matter within three years of the infringing act. If the Court does not take that step, then—at a minimum—the Court should take care not to cast doubt on the applicability of equitable tolling in those circumstances and should expressly reserve the issue, thereby ensuring that it is open for consideration in a future case and that there is no basis for misunderstanding this Court's decision to foreclose such consideration.

As for the discovery rule that is the subject of the parties' dispute, amicus agrees with petitioners that the rule can apply to Section 507(b) only in circumstances that do not exist in this case and that it is crucial not to adopt a broad-based discovery rule that would regularly allow stale claims reaching back beyond the three-year period that Congress chose. Such a rule would be harmful to members of the recording industry, who would otherwise be forced to defend against "zombie" disputes that should have been raised, if at all, many years—and sometimes many decades—ago, before memories have faded and critical evidence has disappeared. To further ensure that "black box" copyright infringement does not go unremedied, however, this Court may wish to preserve for future consideration the question whether the narrow version of the discovery rule described by petitioners—which plainly does not cover the claims at issue in this case—might extend to cover that particularly and unusually hidden type of infringement. Like fraud, latent injury, and medical malpractice, "black box" infringement involves a form of concealment that is part and parcel of the injurious act on which a plaintiff's claim is premised.

ARGUMENT

I. This Court Should Acknowledge Or, At A Minimum, Take Care Not To Cast Any Doubt On The Applicability Of Equitable Tolling Where Detection Of Copyright Infringement Within Three Years Is Practically Impossible

A. Equitable Tolling Applies To Section 507(b)

1. Equitable tolling "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Arellano* v. *McDonough*, 598 U.S. 1, 6 (2023) (citation omitted); see, *e.g.*, *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 255 (2016); *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10-11 (2014). The "extraordinary circumstance[] * * * that caused a litigant's delay must" also "have been beyond [the litigant's] control." *Menominee Indian Tribe*, 577 U.S. at 256-257 (citations omitted).

That doctrine is narrower than, and distinct from, a discovery rule under which the time to sue is measured from discovery of an underlying wrongdoing. A discovery rule "*delays* accrual of a cause of action until the plaintiff has 'discovered' it." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010) (emphasis added). As this Court has recently explained, particularly as to a statute of limitations that is triggered by accrual of a claim, the discovery rule represents "not a construction of [the] statute" of limitations but rather "an enlargement of it." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019) (citation omitted). In contrast, equitable tolling stops the limitations-period clock after a claim

has *already* accrued. Rather than enlarging the text of a statute of limitations that is based on the time of accrual, equitable "[t]olling" is "a rule of interpretation tied to that limit." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681 (2014). And because equitable tolling applies only in extraordinary cases, its effect on a congressionally selected limitations period is modest. See *Rotella* v. *Wood*, 528 U.S. 549, 561 (2000) ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."); *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) (equitable tolling is to be "applied sparingly").

Consistent with that "distin[ction] between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations," this Court has frequently recognized that equitable tolling may be appropriate even if a discovery rule does not apply. *Holland* v. *Florida*, 560 U.S. 631, 647 (2010) (citation omitted); see *Petrella*, 572 U.S. at 678 ("statutes of limitation are not controlling measures of equitable relief" (citation omitted)). For example, in *Rotkiske*, the Court refused to read a general discovery rule into the Fair Debt Collection Practices Act, stating that doing so would represent "[a]textual judicial supplementation." 140 S. Ct. at 361. But the Court nevertheless explained that its decision did not rule out application of the "traditional equitable tolling doctrine" (or other "equitable doctrines"). *Id.* at 361 & n.3.

The same is true of *Rotella* v. *Wood*, 528 U.S. 549 (2000), in which this Court rejected a form of discovery rule in the RICO context. See *id.* at 555-560. In that case, the Court declined to "soften[]" an "accrual rule" by allowing a "pattern discovery feature" that would

undercut the RICO statute's policies and "extend the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete." *Id.* at 558. But the Court was careful to "not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling," explaining that "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty." *Id.* at 560-561; see, *e.g.*, *Gabelli* v. *SEC*, 568 U.S. 442, 447 n.2 (2013) (addressing applicability of a discovery rule while noting that the government had disclaimed any reliance on "equitable tolling principles" to extend the statute of limitations for seeking civil penalties from securities-law violators).

2. The Copyright Act provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. 507(b). That provision is "presumptively subject to equitable tolling." *Boechler, P.C.* v. *Comm'r of Internal Revenue*, 596 U.S. 199, 209 (2022). Because such tolling is a "traditional feature of American jurisprudence," this Court has regarded it as "a background principle against which Congress drafts limitations periods"—a principle that "Congress" does not "alter * * * lightly." *Id.* at 208-209.

Here, there is "nothing" in the Copyright Act "to rebut the presumption" that the limitations period set forth in Section 507(b) is subject to equitable tolling. *Boechler*, 596 U.S. at 209. Section 507(b) does not include an already exhaustive list of equitable exceptions—or, indeed, *any* equitable exception that might suggest that Congress considered the range of possible

applications of equity to the limitations period and decided to accept some of those applications but not others. See, *e.g.*, *Arellano*, 598 U.S. at 8; *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). The provision does not provide an "unusually generous" length of time in which to bring suit. *E.g.*, *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998). And neither Section 507(b) itself nor the Copyright Act more generally has any other textual feature that would be inconsistent with pausing the running of the statute of limitations in unusual circumstances in which no other result would be equitable.

In addition, both precedent and legislative history support the conclusion that the limitations period in Section 507(b) is subject to equitable tolling. In *Petrella*, the Court rejected laches as inconsistent with Section 507(b), but discussed equitable tolling favorably and described it as "a rule of interpretation" that "is read into every federal statute of limitation." 572 U.S. at 681 & n.17. And the dissent in *Petrella* noted, without any criticism of the majority's statement in that regard, that the majority had "preserv[ed] doctrines that lengthen the period for suit when equitable considerations" warrant, including "equitable tolling." *Id.* at 695 (Breyer, J., dissenting).

The legislative history confirms that Congress expected equitable tolling to apply to the Section 507(b) limitations period. The Senate Report addressing the amendment to the Copyright Act that added Section 507(b) acknowledges that federal courts "generally[] recognize" certain "equitable situations [i]n which the statute of limitations is generally suspended," and the Report rests on that recognition as a basis for declining to "specifically enumerat[e]" such situations in the

statute itself. S. Rep. No. 85-1014, at 3 (1957), as reprinted in 1957 U.S.C.C.A.N. 1961, 1963 (explaining that the House Judiciary Committee reached the same conclusion); see *ibid.* (noting various situations in which equity would be expected to suspend the running of the limitations period, such as "the disabilities of insanity or infancy," that have long been understood to justify equitable tolling); *Petrella*, 572 U.S. at 681 n.17 (mentioning "a party's infancy or mental disability" as basis for equitable tolling); 13 *American and English Encyclopaedia of Law* 739-745 (1890) (same). More generally, the legislative history evinces a recognition that the typical case in which the three-year statute of limitations applies is one in which there is "an adequate opportunity for the injured party to commence his action" because "generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights," S. Rep. No. 85-1014, at 2—thus leaving open the possibility of equitable tolling in truly extraordinary circumstances in which the injured person, despite diligence and through no fault of his own, has been unable to ascertain the existence of infringement.

B. Equitable Tolling Plays A Critical Role In Addressing Copyright Cases In Which Discovery Of Infringement Within Three Years Is Impossible As A Practical Matter

1. Section 507(b) was enacted in 1957. As the legislative history reflects, Congress thought that copyright infringement occurring at that time would be carried out openly. The Senate Report discussing Section 507(b) states, for instance, that given "*present practices* in the publishing industry" the chances of

"fraudulent concealment" of infringement are low. S. Rep. No. 85-1014, at 2 (emphasis added). It also states that when a copyright is infringed "generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights." *Ibid.*

Copyright infringement—including infringement involving the recording industry—is usually still carried out in that open way. But that is not inevitably true. Given technological advancements that make copying easier and, in some cases, completely undetectable, today it is sometimes *impossible* for copyright owners to learn of infringement of their works—no matter how diligent they are and no matter how strenuously they investigate. See generally, *e.g.*, *Starz Ent., LLC* v. *MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1246 (9th Cir. 2022) ("evolution of technology" can make copyright infringement "easier to commit" and "harder to detect" (citation omitted)).

The starkest example of such "black box" copyright infringement is the "ingest[ing]" and copying of copyrighted works by certain computer systems whose operators obtain the works from the internet or other electronic sources. See U.S. Patent and Trademark Office, *Public Views on Artificial Intelligence and Intellectual Property Policy*, at 24 (Oct. 2020), https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf. Those generative "artificial intelligence" systems are "trained" on copyrighted content to generate still more content in response to a prompt. *Ibid.* There is no question that the ingesting process—involving vast data lakes of copyrighted material—constitutes copyright infringement, because "almost by definition" it "involve[s] the reproduction of

entire works or substantial portions thereof." *Ibid.*; see Christopher Zirpoli, Cong. Rsch. Serv., LSB10922, *Generative Artificial Intelligence and Copyright Law*, at 3 (Sept. 29, 2023), https://tinyurl.com/bd5pny9p ("This training process involves [computer systems] making digital copies of existing works"); *Thomson Reuters Enter. Ctr. GmbH* v. *ROSS Intel. Inc.*, 529 F. Supp. 3d 303, 313 (D. Del. 2021) (denying motion to dismiss a copyright infringement claim where defendant had "downloaded significant amounts of allegedly copyrighted material" and "leveraged" it "to develop its platform" (citation omitted)).

As to that type of copying, however, copyright owners are almost always in the dark for extended periods of time about whether copying has occurred at all, let alone which (if any) of their copyrighted works has been copied. When a copyright infringer copies or performs a work without authorization, there is usually some public record of that fact that can be ferreted out by someone, such as an unauthorized copy of a novel available for sale; an unauthorized performance of a play put on in a public space; or an unauthorized playing of a song over the loudspeakers at a public event. But the ingesting and copying process carried out by an artificial-intelligence system generally takes place entirely within the system itself, without an available record of exactly which works have in fact been copied, and often without outputs that could alert a copyright owner to the infringement. See, *e.g.*, Complaint ¶ 79, *Authors Guild* v. *OpenAI Inc.*, No. 1:23-CV-08292 (S.D.N.Y. Sept. 19, 2023), Dkt. No. 1 (alleging that the defendant "does not disclose or publicize with specificity what datasets" its algorithms "were 'trained' on"); *Comments of the Am. Ass'n of Indep. Music and Re-*

cording Indus. Ass'n of Am., Inc., at 29-30 (U.S. Copyright Office Dkt. No. 2023-6), https://www.regulations.gov/comment/COLC-2023-0006-8833. In that situation, it may well be impossible as a practical matter for "the person injured" to "receive[] reasonably prompt notice" of "any infringement of his rights." S. Rep. No. 85-1014, at 2.

2. Equitable tolling is an appropriate way to address that scenario, which satisfies all of the elements of the demanding equitable-tolling test.

First, where copyrighted material is secretly ingested and copied in electronic form without any public visibility—as is typically the case in the "training" of an artificial-intelligence system—even the most diligent copyright owner likely will not be able to discover that infringement for a lengthy period. See *Arellano*, 598 U.S. at 6. That is not a circumstance in which the copyright owner could have brought suit within the limitations period if the owner had just tried harder and investigated more thoroughly.

Second, the unusual and practically complete undetectability of "black box" copyright infringement is an extraordinary circumstance. See *Arellano*, 598 U.S. at 6. That type of infringement is very different than run-of-the-mill infringement, which leaves a publicly available trail that a diligent copyright owner usually can follow. See pp. 8-9, *supra*. Such hidden infringement was not within the contemplation of Congress at the time the three-year statute of limitations was enacted, and it is extraordinary in its technological novelty and sophistication. That will remain true even if—as technology continues to evolve—copying by com-

puter systems for purely intra-system "training" purposes, rather than for public-facing sale or performance, becomes more frequent.

Third, the extraordinary circumstance at issue is plainly beyond a copyright owner's control. See *Menominee Indian Tribe*, 577 U.S. at 256-257. Computer systems that scour the world for copyrighted works to be added to hidden data lakes and then draw from those lakes to generate content are controlled by third parties that operate without transparency, thus preventing a copyright owner from knowing about infringement of any particular work.

This case does not directly present the question whether equitable tolling applies to the limitations period set forth in Section 507(b), as respondents have forfeited that issue and placed full reliance on a discovery-rule theory. See Pet. Br. 44 n.9. But equitable tolling plays a critical role in copyright cases, especially given the developments in technology that have occurred since Congress enacted Section 507(b)—and the importance of that role will only continue to grow as the relevant technology becomes more sophisticated and new technology appears. In that context, equitable tolling strikes a balance: it permits lengthening of the three-year limitations period only in unusual cases, while still allowing dismissal of clearly belated claims that might survive under a broader-based discovery rule.

Accordingly, it is important to copyright owners, including RIAA's members, that—in the course of discussing the discovery rule in this case—this Court not cast doubt on the use of equitable tolling in the context of copyright infringement that is effectively undetectable within three years of the infringing act. This

Court could avoid doing so either by (a) affirmatively recognizing in its decision that the three-year limitations period is subject to equitable tolling in cases in which infringement is impossible to discover within three years of its occurrence, or (b) at a minimum, expressly reserving that issue for a future case so that nothing in the Court's decision is misunderstood as rejecting the use of equitable tolling in those circumstances.

II. Petitioners Correctly Explain That The Discovery Rule Can Apply To Determining The Timeliness Of A Copyright Suit Only In Certain Limited Circumstances That Do Not Exist Here But May Exist In Certain Infringement Cases

Amicus agrees with petitioners that this Court should reject a broad-based discovery rule for copyright infringement claims or, at minimum, should impose a constraining equitable exception on such a rule that enforces a three-year limitation on retrospective relief, so as to avoid regularly extending the three-year statutory limitations period to encompass stale claims and deprive parties of repose. See Pet.Br.15-30, 41-44. Rather, as petitioners correctly state, a discovery rule can apply to Section 507(b) only in highly limited circumstances that do not encompass this case. See *id.* at 33-41. In addition to acknowledging the applicability of equitable tolling to the Section 507(b) limitations period, this Court may wish to preserve the question whether that narrow form of the discovery rule should be extended to cover "black box" copyright infringement of the type discussed above.

1. Petitioners ably explain why a broad-based discovery rule like the one that respondents urge is inconsistent with the text of Section 507(b). In addition, this Court's adoption of such a rule would be deeply harmful to RIAA and its members, who sometimes bring copyright claims and sometimes defend against such claims. To be sure, the three-year limitations period in Section 507(b) may be extended as a matter of equity in certain circumstances. See, *e.g.*, pp. 8-13, *supra*. But allowing an extension of that three-year period *whenever* a plaintiff can claim that he failed to discover copyright infringement until after that period was over would deprive members of the recording industry of much-needed repose.

A key purpose of the three-year statute of limitations is enforcing "a policy of repose." *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment); see *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975) (explaining that imposition of a limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). That ensures that potential defendants do not face an "interminable threat of liability." *California Public Employees' Retirement System* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049-2050 (2017).

The interminable threat of liability posed by this Court's adoption of respondents' broad-based discovery rule would be highly burdensome to members of the recording industry. Such a rule would give rise to a tremendous amount of business uncertainty, as it would create a serious ongoing possibility that copy-

right infringement claims—perhaps many infringement claims, perhaps seeking enormous amounts of money or other onerous relief—might crop up at any time based on long-ago conduct, including conduct many decades in the past. Moreover, after a certain period of time has gone by, defending against such claims can become very difficult. "[E]vidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 568 U.S. at 448 (citation omitted). Financial records have been destroyed, or simply cannot be reconstructed. Copyrights have been transferred to new owners—or even transferred multiple times. Royalties have been paid and, in many cases, spent. All of that makes a broad-based discovery rule simply untenable for RIAA's members.

2. As petitioners correctly explain, however, there is a historical basis for a narrow, equity-based discovery rule that applies only "in cases of fraud or concealment." *TRW*, 534 U.S. at 27; see *id.* at 37 (Scalia, J., concurring); Pet. Br. 32-39. This Court has applied a fraud-focused discovery rule in *Bailey* v. *Glover*, 88 U.S. 342 (1874), and *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), among other cases. And this Court later expanded that rule to cover cases of latent disease and medical malpractice—*i.e.*, injuries that are concealed in the sense that a plaintiff simply cannot discover them for a period of time because they have not yet manifested themselves. See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 169-170 (1949).

Like an injury concealed by fraud, or an injury that fails to manifest at all for a number of years, "black box" infringement is extremely difficult to discover because it involves a form of concealment that is essentially inherent in the nature of the bad act itself.

There is thus at least some likelihood that the Court will decide in the future that the analogy between that particular kind of infringement and fraud, latent injury, and medical malpractice is close enough that the narrow form of the discovery rule should be understood to cover such infringement, without accepting the destabilizing broad-based discovery rule advanced by respondents in this case.

Preserving that possibility would be beneficial to copyright owners as a general matter but would not affect the outcome here. There is no dispute that, far from being concealed or impossible to detect, the alleged infringement in this case was fully public. That alleged infringement involved a "smash hit" with large amounts of publicity, air play, and sales. *E.g.*, Pet. Br. 8, 39-40 & n.8. Nothing could be further from infringement that is hidden entirely from view and therefore fully shields an infringer's bad acts from even the most diligent copyright owner.

CONCLUSION

This Court should reverse the judgment of the court of appeals and, regardless of the outcome of the case, either (a) affirmatively recognize in its decision that the three-year limitations period is subject to equitable tolling in cases in which infringement is impossible to discover within three years of its occurrence, or (b) at minimum, refrain from casting doubt on and expressly reserve for future consideration whether equitable tolling applies to the limitations period in Section 507(b) so as to relieve a plaintiff from the strictures of the three-year limitations period when detecting copyright infringement during that period was impossible. In addition, the Court may wish to leave

open the possibility that the narrow "fraud" form of the discovery rule might encompass infringement that is impossible to discover within three years.

Respectfully submitted,

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