No. 22-1078

In The
Supreme Court of the United States

WARNER CHAPPELL MUSIC, ET AL.,

Petitioners,

v.

SHERMAN NEALY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

This Brief is filed in accordance with Supreme Court Rule 37.3, as revised in 2023.

NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS ("NSEAL"), previously known as California Society of Entertainment Lawyers, is a non-profit 501(c)(3) organization that was founded in 2013. This national organization advocates for artists' and entertainers' rights and is comprised of attorneys across the United States who represent authors, screenwriters, songwriters, musicians, and other creative professionals in the entertainment and arts industries. Its members have litigated thousands of entertainment and art cases in trial and appellate courts throughout the country, including many of the most important recent copyright, art, and entertainment cases, and have advised scores of creative professionals on litigation, licensing, and intellectual property strategy. Its members have also argued for and obtained crucial decisions at the appellate court level in cases involving artists' rights and entertainment law. The organization has submitted *amicus* briefs in support of the prevailing party in three previous cases in this court, *viz*., *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. 663 (2014); *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P*., 142 S.Ct.

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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. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

941 (2022); and *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), all of which involved important issues of copyright law, and all of which reached conclusions consistent with the reasoning in NSEAL's briefs.

SUMMARY OF ARGUMENT

The statute of limitations set forth in 17 U.S.C. § 507 begins to run when an artist discovers, or reasonably should have discovered, an infringement of her copyrights. And so long as an artist files her claim within three years of that date, she may recover from the infringer all damages from the infringement, regardless of when they were reaped. This rule provides a reasonable opportunity for artists to actually discover the infringement, obtain counsel, consider the burdens and benefits of federal court litigation, obtain a copyright registration, and file claims to enforce their rights. To hold otherwise would reward infringers who successfully conceal their misconduct and would run afoul of the Copyright Act, the *Petrella*[2] analysis, and decades of precedent.

Artists and those that rely on artistic content to generate profit have long applied such a rule and it was not until the relatively recent *Sohm*[3] decision that any court applied a temporal damages bar to a timely filed

[2] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 134 S.Ct. 1962, 1976, 188 L.Ed.2d 979 (2014).

[3] *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020).

claim. Said approach deviated from longstanding principles of law and worked to deny or limit an artist's damages even when she filed her case within three years of discovery. The *Sohm* approach unfairly penalizes artists and provides windfalls to infringers.

And it conflicts with the Copyright Act. If the drafters intended to limit an artist's damages in some way in the statute, they would have placed that limitation in 17 U.S.C. § 504 (the section relevant to damages), rather than in the section relating to the statutes of limitations, requiring interpretation here, *viz.*, 17 U.S.C. § 507.

For these reasons, as more fully explained below, NSEAL strongly urges the Court to affirm the Eleventh Circuit's decision.

ARGUMENT

I. The Copyright Act's statute of limitations runs from discovery of the infringement

The Eleventh Circuit's decision should be affirmed based on the plain language of the Copyright Act. This Court recently advised that in interpreting the Copyright Act, "we follow the text of the statute." *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S.Ct. 941, 946 (2022), citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). So, here, "we begin by analyzing the statutory language." *Rotkiske v. Klemm*, 140 S.Ct. 355, 360 (2019) (citation omitted). ("If the

statute is unambiguous, this first step of the interpretive inquiry is our last." *Id*. (citation omitted)).

The Copyright Act unambiguously states that the claim is timely so long as it is "commenced within three years after the claim accrued." 17 U.S.C. § 507(b). Section 507 includes no language at all referencing any temporal damages bar or limitation. While the word "accrual" may be less than pellucid, a claim ordinarily "accrues" when "the plaintiff has a 'complete and present cause of action.'" *Starz Ent., LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236, 1239 (9th Cir. 2022), quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal*., 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (citation omitted). And, "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund*, 522 U.S. at 201, citing *Reiter v. Cooper*, 507 U.S. 258, 267, 113 S.Ct. 1213, 1220, 122 L.Ed.2d 604 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.") Here, a copyright holder certainly cannot "file suit and obtain relief" until she discovers the claim at issue and satisfies the copyright registration requirements

of 17 U.S.C. § 411. As such, Circuits have consistently applied a "discovery" rule to copyright claims.

II. Warner Chappell's interpretation of the Act contravenes the statute's clear language

Warner Chappell attempts to distort the text of the Copyright Act to withhold profits from artists with whom it has worked in the past and realize windfalls, both here and down the road in the many other cases in which a writer or performing artist seeks or will seek to obtain her royalties or portion of profits from the company.

Under the so-called "injury rule," as urged by Warner Chappell, "a copyright plaintiff's claim accrues when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it." *Nealy v. Warner Chappell Music, Inc*., 60 F.4th 1325, 1330 (11th Cir. 2023), *cert. granted in part sub nom. Warner Chappell Music v. Sherman Nealy*, No. 22-1078, 2023 WL 6319656 (U.S. Sept. 29, 2023), citing *Petrella*, 572 U.S. at 670, 134 S.Ct. 1962.

This rule has long been rejected because its adoption would defy the plain text of the statute and severely limit or entirely obviate artists' rights, while allowing infringers – especially those sophisticated enough to conceal their infringement – to benefit massively from their misdeeds. See *William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009) (rejecting injury rule because "eight of our sister courts of

appeals have applied the discovery rule to civil actions under the Copyright Act" and holding that "use of the discovery rule comports with the text, structure, legislative history and underlying policies of the Copyright Act").

Lack of immediate discovery of an infringement is common because an infringement of copyright begins as soon as the infringer violates an artist's exclusive rights under 17 U.S.C. § 106. 17 U.S.C.A. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be."); see also *Massachusetts Museum of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 48 (1st Cir. 2010) ("One infringes a copyright when he or she violates one of the exclusive rights to a work held by a copyright owner, and the owner has the right to sue for infringement."). And most initial acts of infringement – the act of reproduction, which violates 17 U.S.C. § 106(1) – occur entirely in privacy or semi-privacy.

For example, in the music context, infringement would begin, under an injury rule, as soon as the producer that creates an infringing song in her private studio makes an unauthorized copy of a plaintiff's song and saves that copy into her production software. See 17 U.S.C. § 106(1) (reproduction right). Of course, the artist whose rights have been infringed would have no way to know that this occurred in the private studio,

but it would nevertheless start the statute of limitations running under the injury rule advanced by Warner Chappell. If the actual infringing song is not released until three years after this initial reproduction, the aggrieved artist, even if she discovered the song immediately, would already be beyond the statute of limitations. This is of course an absurd result and illustrates why the discovery rule has always been applied.

The absurdity of the injury rule is manifest when considered in the crucial context of the modern internet. There, application of the injury rule would act to provide impunity and a perpetual license to any website that publishes infringing content and evades detection for three years. Cases such as *Alfa Laval, Inc. v. Flowtrend, Inc*. have held that when an artist cannot provide evidence that an online infringer engaged "in new acts of copyright infringement after it originally posted the [infringing content] on its website," or that there were "later independent acts of copyright infringement, the 'separate-accrual rule' does not extend the limitations period." No. CV H-14-2597, 2016 WL 2625068, at *6 (S.D. Tex. May 9, 2016) (citing *Petrella*, 572 U.S. at 671). Applying the injury rule in the absence of the separate accrual rule would render an artist without a remedy, unable even to file a lawsuit to force the removal of infringing work that has been online more than three years, even if she only recently discovered the infringement. See 17 U.S.C. § 507 ("No civil action shall be maintained under the provisions of

this title unless it is commenced within three years after the claim accrued.").

Given the above, § 507(b)'s application should acknowledge that a copyright infringement claim accrues similarly to claims arising from "latent disease and medical malpractice[.]" *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 239 (5th Cir. 2023), quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 27, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). To be sure, unlike most torts – *e.g.*, a dog bite victim knows of the injury from the moment at which she is bit – a victim of infringement has no knowledge of the tort until she discovers same. Conjure the unprincipled producer copying another's song, or the jewelry counterfeiter fabricating unlawful reproductions, all in private and in violation of 17 U.S.C. § 106, which acts would start the running of the statute of limitations under the injury rule. And the hundreds of thousands of new (and possibly infringing) works transmitted out into the internet ether every day and around the clock, some of which violate § 106. To be sure, to the original artist, these violations are "unknown or unknowable until the injury manifests itself[.]" Id., quoting *Rotella v. Wood*, 528 U.S. 549, 556, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (citation omitted). Thus, the statute of limitation for copyright infringement claims, like latent diseases and medical practice, should incorporate a "prevailing discovery rule," as discussed herein. *TRW Inc.*, 534 U.S. at 27, 122 S.Ct. 441.

There is no Circuit split as to the discovery rule and its application is presumed for purposes of this

appeal. Yet, Warner Chappell urges a departure from this settled precedent. The invitation should be declined.

III. The Copyright Act contains no temporal bar on damages

Under *Sohm*, which, like all other courts, applied the discovery rule, an artist may file a suit on a date more than three years after the initial infringement. *Sohm*, 959 F.3d at 50 ("the discovery rule applies for statute of limitations purposes in determining when a copyright infringement claim accrues under the Copyright Act"). *But*, that artist is improperly barred from recovering profits from the infringer if they were realized more than three years before the filing date. Id. at 51 ("the Supreme Court explicitly delimited damages to the three years prior to the commencement of a copyright infringement action"). This temporal bar appears nowhere in the Copyright Act and provides a massive windfall to infringers, especially wily ones with the means and sophistication to conceal their infringement.

Sohm's novel and wholly improper damages bar materially deprives artists of the ability to fully enforce their rights. In that case, the Court sought to apply *Petrella* in which the daughter of the writer of the "Raging Bull" screenplay brought an infringement case against the movie studio long after the "Raging Bull" film was released. 572 U.S. at 663. In that case, it was undisputed that the plaintiff had been well aware of the "Raging Bull" movie for decades. However,

Petrella did not address the statute of limitations at all but instead considered the viability of the laches defense in the case of copyright infringement claims. The Supreme Court correctly concluded that in such a circumstance the laches defense was rather weak because, among other things, the impact of a delay in bringing suit is mitigated by the fact that "a successful plaintiff can gain retrospective relief only three years back from the time of suit." This was quite clearly *dicta* applicable only to the circumstances of that case where the plaintiff did know about "Raging Bull" since it was released in 1980; the court was obviously discussing those circumstances as they applied to the doctrine of laches in a copyright context, and not making a ruling as to damages in all contexts.

The *Sohm* decision, though, misapplied this *dicta* to stand decades of precedent on its head. In *Sohm*, Judge Richard J. Sullivan, citing to *Papazian v. Sony Music Corp*. – his own decision from his district court tenure – and the *Petrella dicta* discussed above, found that *Petrella* bars all copyright holders from recovering damages beyond the three-year window that precedes the filing of their lawsuit.

The reasoning of *Sohm* ran *contra* to the discovery rule and, as Professor Nimmer stated in his treatise, "took a hundred-and-eighty degree turn" to create a rule that was inconsistent with the statute and case law. See 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.05[B][2][d][ii] (2021). It also grated against the Supreme Court's reasoning in *SCA Hygiene Products Aktiebolag v. First Quality Baby*

Products, LLC, 580 U.S. 328, 137 S.Ct. 954, 197 L.Ed.2d 292 (2017), which had already made clear that *Petrella* did not impact the "discovery rule."

Sohm's damages bar finds no support in the Copyright Act. Congress set forth the three-year statute of limitations in Section 507 of the Copyright Act, which pertains to "limitations on actions." See 17 U.S.C. § 507. However, a copyright owner's ability to recover actual damages and an infringer's profits is enshrined in Section 504, entitled "remedies for infringement: damages and profits." See 17 U.S.C. § 504. "Had Congress intended to limit recoverable damages or profits to those arising only from acts of infringement during the three-year period before suit was commenced, it would have said so, and said so in § 504, which sets forth detailed instructions as to the proper calculation of actual and statutory damages and profits." *Starz Ent., LLC*, 39 F.4th at 1246. However, § 504 of the Copyright Act makes no mention of any three-year limit on damages or profits and never refers to § 507, but rather expressly states that a copyright plaintiff is entitled to recover "the actual damages suffered by him or her" and "**any** profits of the infringer that are attributable to the infringement." See § 504 (emphasis added).

The following hypotheticals further illustrate why a temporal damages bar is nonsensical: an infringer sells unauthorized copies of an author's book from 2010 to 2019 and the artist discovers one in a secondhand store in 2023. She can file suit at that time but will not be able to recover *any* of the proceeds from

the infringement because those profits accrued more than three years before she filed suit. The infringer walks away with *all* of the ill-gotten profits.

A similarly inequitable result would inure if an importer on-shored tens of thousands of garments bearing unauthorized copies of a designer's original and copyrightable lace, embroidery, or graphic design and sold them through a regional chain of retail stores in a region other than the one in which the designer resides. After selling the infringing garments in that region for ten years, the retailer opens a store in the designer's neighborhood. A year later, the designer, discovers the garment being worn by a fellow customer in a coffee shop. She identifies the infringer by reading the garment label, and then immediately rushes to court. While she would not be denied all damages – she would be allowed to seek to recover the most recent three years of the infringer's profits under *Sohm* – the infringer would keep much more: all profits from the first eight (and likely most profitable) years of the infringement. This is inequitable.

Note also that an artist, after discovering an infringement, still has to find (and save up the funds to pay) an attorney. And then she must register the work with the Copyright Office. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 886–87, 203 L.Ed.2d 147 (2019) (artist must register work before filing suit). The registration process requires more money from the artist and can take more than a year (and even longer if there are issues with the application or deposit). Once the registration is obtained, a

complaint must be drafted and filed, which again takes time and money. These acts, in aggregate, can take three years, which is one reason why the Copyright Act provides a three-year statute of limitations. But, with every passing day the artist's available damages decrease. This is an unjust result.

Notably, Warner Chappell, though relying heavily on the *Sohm*-induced Circuit split to gain access to the Court, completely abandons *Sohm*'s reasoning in its opening brief. It had no other choice, as discussed below.

IV. No other Circuit applies a temporal damages bar

The Ninth Circuit, in *Starz Ent., LLC*, wrote that adopting the *Sohm* damages bar would mean that "a copyright plaintiff who, through no fault of its own, discovers an act of infringement more than three years after the infringement occurred would be out of luck. Such a harsh rule would distort the tenor of the statute." *Starz Ent*., 39 F.4th at 1246 (citation omitted). The Circuit also wrote that it "makes little sense to bar recovery of damages beyond the three-years before the suit was filed where the copyright holder did not delay, but acted in accordance with § 507(b) by filing his complaint within three years of discovery." Id. at 1238.

The Eleventh Circuit agreed with the Ninth Circuit when deciding *Nealy v. Warner Chappell Music, Inc.*, finding that if the claim is timely under the discovery rule, the infringer may be required to disgorge

all profits from the infringement. 60 F.4th 1325, 1331 (11th Cir. 2023). It based this conclusion on two grounds: first, that *Petrella*'s statements about the availability of relief were directed to the way the statute of limitations works when claims accrue under the injury rule, not the discovery rule (because there is no belated discovery), and, second, "the text of the Copyright Act does not place a time limit on remedies for an otherwise timely claim." Id.

The Fifth Circuit is also onboard, rejecting the arguments advanced by petitioner here because "*Petrella* does not lead to that conclusion." *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 239 (5th Cir. 2023). The Fifth Circuit further noted, "[w]ere we to hold" that the discovery rule does not apply to § 507(b), "we would be the only court of appeals to do so after [*Petrella* and *Rotkiske*]." Id., 65 F.4th at 245 (citation omitted).

Approximately 30 other district courts have also explicitly or implicitly rejected *Sohm*'s use of *Petrella* to create a damages bar to limit the discovery rule. See *Starz Ent., LLC*, 39 F.4th at 1244 (collecting cases). *Sohm*'s damages bar finds no support in precedent and the plain text and intent of the Copyright Act. Its reasoning should be rejected.

V. The solutions to the foregoing problems are the discovery and separate-accrual rules

Courts tasked with interpreting the Copyright Act have, for decades, and in accord with the Copyright

Act's intent, have capably addressed the above problems via the "discovery rule" and "separate accrual rule." While *Sohm* has disrupted this flow, refocusing on the below doctrines will hasten a return to rectitude.

A. The discovery rule

This rule ensures that a copyright infringer does not benefit from its infringement. While the injury rule rewards an infringer who successfully conceals her infringement, the discovery rule prevents such injustice by starting the three-year limitations period "only when the copyright holder knows or should know of the infringing act." *Starz Ent., LLC*, 39 F.4th at 1246. This means that a copyright owner cannot lose her right to seek relief before she reasonably has the chance to act, no matter how well an infringer conceals their misconduct. The discovery rule also ensures that an artist who does not have the resources to scour publicly available media daily is not prejudiced if she discovers an infringement 2-3 years or more after it occurs. It also ensures that an infringement that occurs in private or semi-private does not occur with impunity.

Without the discovery rule, an artist would have to police every outlet for potential infringement just to maintain their ability to protect her rights in her art, but this is actually *impossible*. It is reported that more than 100,000 new songs are created and uploaded to the internet every day. Chris Willman, *Music Streaming Hits Major Milestone as 100,000 Songs are Uploaded*

Daily to Spotify and Other DSPs, VARIETY, Oct. 6, 2022, https://variety.com/2022/music/news/new-songs-100000-being-released-every-day-dsps-1235395788/. More than 3.2 billion photographs and 720,000 hours of video are posted daily. T.J. Thomson, Daniel Angus, Paula Dootson, *3.2 billion images and 720,000 hours of video are shared online daily. Can you sort real from fake?*, https://theconversation.com/3-2-billion-images-and-720-000-hours-of-video-are-shared-online-daily-can-you-sort-real-from-fake-148630. It would take teams of investigators and a massive budget to scour that universe of material to identify infringing content. And that is without considering the private acts of infringement. Under the injury rule, and depending on when the discovery occurs, each day that an artist is unable to identify and immediately sue for infringement is a day for which an infringer can keep its profits from the infringement.

The discovery rule protects against such an occurrence and ensures that an artists' rights are not denied when she acts with reasonable diligence. If a claim "accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his" rights, an artist can more feasibly enforce his rights. *Nealy*, 60 F.4th at 1330 (citation omitted).

Because copyrightable works are created upon fixation in a tangible medium rather than upon publication, the first unlawful reproduction is almost always made in private, where there is no way that a plaintiff can learn of the injury. The discovery rule starts the

clock on an artist's ability to recover an infringer's ill-gotten revenues not upon this first private reproduction, when there are likely little to no revenues, but rather when the artist actually has the ability to know of the infringement and to (hopefully) determine whether its profitability or potential profitability justifies the filing of a lawsuit. The discovery rule thus ensures that an artist does not lose her right to recover the entirety of an infringer's profits simply because the infringer first fixed the work in private before publicly exploiting it.

It also ensures that lawful infringement claims are not filed unnecessarily just to maintain an artist's statute of limitations. If an artist must file their claim within three years of the infringing work's initial fixation they may at times have to file a without any damages if the infringer has yet to publicly and monetarily exploit the work. A right without a remedy is no right, particularly given the expense of copyright litigation. In contrast, the discovery rule ensures that the artist's claim generally accrues only after the infringement has been published to the public and monetized to the extent that the artist can recover damages that would offset the heavy costs of litigation.

B. The separate accrual rule

The "separate-accrual rule" provides that, "when a defendant commits separate violations of [the Copyright Act], the statute of limitations runs separately from each violation." *Media Rights Tech., Inc. v.*

Microsoft Corp., 922 F.3d 1014, 1022 (9th Cir. 2019), quoting *Petrella*, 572 U.S. at 671. Each new infringement "gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs." Id., quoting *Petrella*, 572 U.S. at 671, 134 S.Ct. 1962.

By applying this rule in combination with the discovery rule, courts have rigorously enforced the Copyright Act and held infringers accountable while also limiting damages in circumstances where there is any unreasonable delay in enforcement. Verily, as this Court has previously noted, it "is hardly incumbent on copyright owners, [] to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on that work, or even complements it." *Petrella*, 572 U.S. at 665. Applying an injury rule will run afoul of these considerations, as any artist that discovers a claim will be forced to rush to court to sue because she will likely not know the date the infringement began (*i.e*., when the "injury" occurred) and cannot risk the expiry of the statute of limitations. Forcing artists to hastily file claims or lose their rights contravenes the text and spirit of the Copyright Act, and its interpretation in *Petrella*.

The separate accrual rule then – making each additional violation of the artists' rights start a new three-year period – ensures the artist can "defer suit until she can estimate whether litigation is worth the candle" by filing after a subsequent infringement

which generated sufficient damages to justify a suit. *Petrella*, 572 U.S. at 6883.

The application of the discovery rule in combination with the separate accrual rule prevents an artist from being denied her right to file claims for violations of her copyright and ensures the availability of damages. Denying such rights when she did not know or have reason to know an infringement occurred, or forcing her to hastily file a lawsuit for a claim that may not have a value to justify the cost of litigation, runs afoul of the statute and its purpose.

VI. This Court should affirm the Eleventh Circuit's decision

It is tremendously challenging to make a living as an artist and never has it been more difficult and expensive for an artist to enforce her rights in court. Limiting an artist's damages, as urged by petitioner, will result in fewer artists being willing and able to enforce their rights in court.

The Eleventh Circuit's approach accords with the other Circuits and balances the equities between copyright holders and copyright infringers. There is little motivation for an artist to delay in bringing a claim. And in some cases, a delay is warranted or even encouraged, such as in cases where the scope of infringement "has no effect on that work, or even complements it." *Petrella*, 572 U.S. at 665.

Most artists are unrepresented and do not have counsel to consult should they discover an infringement.

Forcing them to scour the millions of uploads to the internet on a daily basis, and then rush to engage counsel and file a claim once it is discovered, because failing to act immediately might limit their damages, is unjust and violative of the Copyright Act. Petitioners' approach will result only in a windfall to copyright infringers, especially to those who conceal their unlawful acts, and the deprivation of rights and remedies for those artists whose creativity most benefits society and whose output is most vulnerable to infringement. NSEAL respectfully submits that the Eleventh Circuit's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's decision should be affirmed.

Respectfully submitted,

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