

In the
Supreme Court of the United States

MARIA SOLANGE FERRARINI,
Petitioner,

v.

IPEK IRGIT, AN INDIVIDUAL; AND
KIINI, LLC, A NEW YORK LIMITED LIABILITY COMPANY,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An author seeking to recover for copyright infringement must file suit “within three years after the claim accrued.” 17 U.S.C. § 507(b).

In *Petrella v. MGM*, 572 U.S. 663 (2014), this Court held “[t]o the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period,” conduct occurring before the three-year look-back period “cannot be invoked to preclude adjudication of [the] claim.” *Id.* at 667.

Petitioner authored a unique and colorful swimsuit design in Brazil in 1998. Respondent obtained a copy of the protected work in 2012 and began selling infringing copies in late 2013. Petitioner filed suit for copyright infringement on April 11, 2019.

The Second Circuit upheld dismissal of petitioner’s infringement suit because she was aware of respondents’ infringing conduct by at least 2015, three years and five months before filing suit. The Second Circuit applied a judge-made laches-like ownership claim accrual test to reach this outcome, placing it in direct conflict with this Court and its sister circuits. This case presents an ideal vehicle to resolve these conflicts.

The Question Presented is:

Whether the judge-made laches-like ownership claim accrual test applies to bar a copyright infringement suit brought within the three-year look-back period prescribed by Congress in section 507(b).

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the Court of Appeals:

Petitioner and Plaintiff-Appellant

- Maria Solange Ferrarini

Respondents and Defendants-Appellees

- Ipek Irgit, an individual
- Kiini, LLC

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit
No. 21-597-cv

Maria Solange Ferrarini, *Plaintiff-Appellant*, v.
Ipek Irgit, an Individual, Kiini, LLC, a New York
Limited Liability Company, *Defendants-Appellees*

Date of Final Opinion: May 31, 2022

Date of Rehearing Denial: July 22, 2022

United States District Court
for the Southern District of New York
19 Civ. 0096 (LGS)

Maria Solange Ferrarini, *Plaintiff*, v.
Ipek Irgit, et al., *Defendants*

Date of Final Opinion and Order: February 17, 2021

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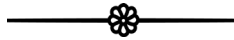
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PETITION FOR A WRIT OF CERTIORARI

Maria Solange Ferrarini respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.



OPINIONS BELOW

The ruling and order of the District Court granting summary judgment in respondents' favor appears at *Ferrarini v. Irgit*, No. 19-cv-0096, 2021 U.S. Dist. LEXIS 29619, slip op. (S.D.N.Y. Feb. 17, 2021). (App.5a-18a). The District Court order denying respondents' motion to dismiss appears at 19-cv-0096, 2020 US. Dist. LEXIS 6377 (S.D.N.Y. Jan. 9, 2020). (App.19a-38a).

The United States Court of Appeals for the Second Circuit order affirming the District Court judgments appears at *Ferrarini v. Irgit*, No. 21-0597-cv, 2022 U.S. App. LEXIS 14862 (2d Cir. May 31, 2022). (App.1a-4a). Petitioner's request for a rehearing en banc was denied on July 22, 2022. (App.39a). These opinions were not designated for publication.



JURISDICTION

The judgment of the Court of Appeals issued on May 31, 2022. (App.1a-4a). On July 22, 2022, the Second Circuit denied petitioner’s timely request for rehearing en banc. (App.39a). The Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. art. I, § 8, cl. 8

Article I, Section 8, Clause 8 of the Constitution of the United States provides in pertinent part:

The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive right to their respective Writings . . .



STATUTORY PROVISION INVOLVED

17 U.S.C. § 507(b)

Chapter 5 of the Copyright Law entitled “Limitations on Actions” provides in section 507(b), 17 U.S.C. § 507(b):

(b) Civil Actions – No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.



STATEMENT OF THE CASE

This case embodies a long-foreseen collision between this Court’s articulation of fundamental principles of copyright law and circuit court jurisprudence that has crept slowly but steadily away from those principles in favor of finality and expediency. Although “[o]ne cannot fault courts for attempting to provide certainty to [copyright] litigation,” when “Congress has opted for flexibility, that judgment should be respected, regardless of the messiness that is inevitable.” 6 William F. Patry, *PATRY ON COPYRIGHT* § 20:41 (2021). The lower courts’ expansion of a judicially-created ownership claim accrual test to bar timely copyright infringement claims has resulted in grave inequity, violated this Court’s rulings, and created a circuit split, all meriting this Court’s attention.

Petitioner Maria Solange Ferrarini authored and published a unique, brightly colored swimsuit design from the beaches of her native Brazil in 1998. (App. 41a, 47a). She has sold copies of her work, along with various derivative works ever since, affixing her name “Solange” and “Trancoso, B.A.” in the waistband to indicate the hand-crocheted copy was of her design. (App.41a, 44a, 53a, 83a).

Respondents acquired a copy of the Solange design in 2012 and in late 2013 began selling a nearly identical work, the “Kiini” bikini, at high-end boutiques in New York and around the world. (App.20a-21a, 41a-58a, 71a-72a, 74a, 83a-84a).

Petitioner registered her work with the United States Copyright Office on June 23, 2018, and on April

11, 2019, sued respondents for copyright infringement, seeking injunctive relief, damages, and attorney’s fees. (App.60a-64a). Respondents did not dispute their access to petitioner’s work (App.21a, 52a, 74a, 83a-85a, 160a) and could not dispute the substantial similarity between the two designs:



**Petitioner’s
Design**



**Respondents’
Infringing Copy**

Instead, respondents attacked the enforceability of petitioner’s copyright and argued petitioner knew of their infringement—along with the claim they alone created the infringing Kiini bikini—more than three years before she filed suit. (App.3a, 113a-117a, 128a-133a, 149a, 150a-152a, 159-160a). Petitioner’s failure to bring a timely “ownership claim,” respondents averred, meant she was also barred from suing for infringement. (App.12a-18a, 22a-25a, 120a-125a).

Petitioner explained to the lower courts that her claim was for respondents’ infringement of her 1998 design, not for any ownership rights, and that she

sought damages only for the time period allowed by section 507(b)—the three years before she filed suit. (App.98a, 146a-158a).

Applying a laches-like accrual test fashioned by the courts for copyright ownership claims, the Second Circuit accepted respondents' legal obfuscation and held petitioner's timely claims for ongoing infringement were barred along with her out-of-time "ownership claim." (App.2a-3a, 12a-13a, 23a, 25a). "[T]he applicable statute of limitations requires that an action be brought within three years of the accrual date"—in petitioner's case—the first time she "protested that [respondents] claimed to be the creator of [the] bikinis." (App.2a-3a).

Petitioner's argument that the District Court had applied "the wrong framework to the statute of limitations inquiry," was summarily rejected by the Second Circuit as "foreclosed by our decision in *Kwan*. There we held that a time-barred ownership claim will bar a claim for copyright infringement where [there is] a genuine dispute as to the plaintiff's ownership of the copyright." (App.2a-3a) (citing *Kwan v. Schlein*, 634 F.3d 224, 228 (2d Cir. 2011)). Because respondents "do not concede that Plaintiff owns the copyright," petitioner's timely infringement claims were also barred. *Id.*; (App.12a-13a, 24a, 124a-125a).

In *Kwan*, author of the book FIND IT ONLINE, Alan Schlein hired Plaintiff Shirley Kwan to edit multiple versions of the work. 634 F.3d at 226-227. Kwan claimed her edits had been substantial enough to make her a coauthor. *Id.* at 227, 229. Schlein refused to concede Kwan's contributions rose to the level of coauthorship, and therefore ownership, and argued

Kwan was time barred from asserting any such ownership claim because she “was aware of the dispute regarding her rights to FIOL . . . when the first edition was published” listing Schlein as the only author. *Id.* at 229.

Kwan acknowledged that her coauthorship/ownership claims were time barred but argued, however, “that she ha[d] two timely causes of action for copyright infringement relating to the third and fourth editions” because those editions were published less than three years before Kwan filed suit. *Id.* at 229. The Second Circuit disagreed, holding Kwan’s “attendant infringement claims must fail” because where “a plaintiff’s copyright ownership is not conceded . . . copyright ownership, and not infringement, is the gravamen of the plaintiff’s claim to which the statute of limitations is applied.” *Id.* at 230 (citations omitted). In contrast with copyright infringement claims, ownership claims “accrue only once,” the first time a “plain and express repudiation [of authorship] is communicated” and are barred “three years from the time of repudiation.” *Horror, Inc. v. Miller*, 15 F.4th 232, 257 (2d Cir. 2021) (quoting *Zuill v. Shanahan*, 80 F.3d 1366, 1369 (9th Cir. 1996)).

By applying *Kwan*, *Horror*, and the laches-like ownership claim accrual test to bar petitioner’s timely suit for infringement, the lower courts have expanded section 507(b) beyond the Congressionally mandated limits affirmed by this Court, thereby converting a remedial statute of limitations into a substantive statute of repose, despite this Court’s express direction to the contrary. *Petrella v. Metro-Goldwyn Mayer, Inc.*, 572 U.S. 663, 672, 679 (2014).

Under the lower courts' test for copyright claim accrual, an infringer can now extinguish an author's timely claim by challenging enforceability and "refusing to concede" ownership. (App.2a-3a, 12a-13a, 24a, 125a, 154a-155a, 160a). While there may yet be few such "deliberate pirates" bold enough to admit access and still claim they independently created an infringing work, this loophole allows them to avoid all liability for such infringement, indefinitely. *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. Jun. 8, 1916) (Hand, L., a plaintiff's delay in bringing suit "might be irrelevant . . . [i]f the Defendant be a deliberate pirate."). To be sure, the decisions below invite more bad faith actors to follow respondents' path with impunity. (App.2a-3a, 12a-18a, 22a-25a).

The Second Circuit's decision was the first time a circuit court applied the laches-like ownership accrual test, which originated in a jurisprudential desire to settle claims between coauthors, to also bar suit against a third-party infringer like respondents, thereby creating a defense to infringement that Congress never intended, and a split among the circuit courts. *See infra*, p. 12-20; *Merchant v. Levy*, 92 F.3d 51, 52 (2d Cir. 1996) ("[t]his appeal concerns the appropriate time period in which those claiming to be coauthors of a work whose copyright is registered to another person may sue to establish their co-ownership rights.").

The rulings threaten to transform any alleged infringer's refusal to concede ownership into a talisman which, after three short years, permanently extinguishes an author's right to sue for infringement "within the three-year look-back period prescribed by Congress." *Petrella*, 572 U.S. at 676.

Rather than requiring authors around the world to immediately sue every infringer who might refuse to concede their copyright ownership, this Court should correct the Second Circuit’s error and harmonize copyright ownership principles among the circuits, affirming *Petrella* and the statutory right to sue for infringement that attaches in an author upon creation and begins anew with each infringing act. *Petrella*, 572 U.S. at 671 (citing *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992)); *Weissmann v. Freeman*, 868 F.2d 1313, 1317 (2d Cir. 1989) (copyright “vests initially in the author or authors of the works,” 17 U.S.C.A. § 201, and the author owns her copyright from “the moment of its creation.”).



REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT APPLIED A LACHES-LIKE ACCRUAL TEST TO BAR PETITIONER’S TIMELY INFRINGEMENT SUIT, IN DIRECT CONFLICT WITH *PETRELLA*, MERITING SUMMARY REVERSAL.

When it enacted section 507(b), “Congress provided two controlling time prescriptions: the copyright term, which endures for decades,” and 507(b)’s limitations period, “which allows plaintiffs during that lengthy term to gain retrospective relief running [] three years back from the date the complaint was filed.” *Petrella*, 572 U.S. at 672 (emphasis added).

In *Petrella*, the daughter of *Raging Bull* screenplay author Frank Petrella registered a renewal copyright in 1991 and sued for the motion picture’s infringement in 2009. MGM argued that the 18 years Petrella waited

between renewal and suit was “unreasonable and prejudicial” and should bar her from recovering, even for infringements in the three years preceding suit. *Id.* at 675. The Ninth Circuit agreed and applied a presumptive laches bar, dismissing Petrella’s claims because “part of the alleged wrongful conduct occurred outside of the limitations period.” *Id.* Reversing, this Court held that laches could not bar relief “on a copyright infringement claim brought within 507(b)’s three-year limitations period.” *Id.* at 667.

Allowing conduct outside the limitations period to bar relief for infringement within the limitations period would, this Court reasoned, “jettison Congress’ judgment on the timeliness of suit.” *Id.*; *SCA Hygiene v. First Quality*, 580 U.S. 328, 137 S.Ct. 954, 960, 962 (2017) (affirming *Petrella*’s “broad terms” prohibiting laches defense and applying same reasoning to Patent Act statute of limitations). “We saw in [the language of 507(b)] a congressional judgment that a claim filed within three years of accrual cannot be dismissed on timeliness grounds.” *SCA Hygiene*, 137 S.Ct. at 962.

Like petitioner Petrella, petitioner Ferrarini “sought no relief for conduct occurring outside section 507(b)’s three-year limitations period” and alleged numerous and ongoing acts of infringement within the three years before she filed suit. *Petrella*, 572 U.S. at 668; *see* (App.41a-70a, 82a-87a). Yet, the lower courts applied a judge-made laches-like claim accrual test to hold, like the reversed Ninth Circuit in *Petrella*, that respondents’ conduct outside the limitations period had started the clock on petitioner’s timely infringement claims. (App.2a-3a (respondent’s 2015 “claim of creation” barred petitioner’s 2019 infringement claims), 12a-16a, 18a (petitioner was aware of infringing sales

and the parties' "ownership" dispute "no later than 2015," "[c]onsequently, [petitioner's] claim is time barred."), 22a-25a).

"Only by disregarding" 507(b)'s separate-accrual rule and the fact that the provision "itself accounts for delay," "could the Court of Appeals presume that infringing acts occurring [more than three years before suit] bar all relief, monetary and injunctive, for infringement occurring on and after that date." *Petrella*, 572 U.S. at 677. What is more, assuming petitioner has a winning case on the merits, *see* (App.41a-77a, 84a-89a), the lower court's willful disregard of statutory text and this Court's rulings has "effectively [given respondent] a cost-free license to exploit [petitioner's work] throughout the long term of the copyright." *Petrella*, 572 U.S. at 677, n 13. Such an inequitable result is prohibited. *Id.* at 679 (the Court has never "approved the application of laches to bar a claim for damages brought within the time allowed by a federal statute of limitations.").

Having deprived petitioner of the remedies stemming from any time-barred "ownership" claim along with all rights she has as an author to sue for timely, ongoing infringement, the lower courts have converted section 507(b), a remedial statute of limitation, into a substantive statute of repose. This is not what Congress, or this Court, intended.

"The legislative history of 507(b) unequivocally indicates that the provision is to be construed as a remedial, not a substantive limitation on rights." PATRY § 20.35 (where an ownership claim is "brought more than three years after the claim accrued, plaintiff may be deprived of certain remedies, but may not be deprived of authorship.").

When adopting the Copyright Act statute of limitations, Congress wrote “[a]s far as this committee has been able to ascertain, all State statutes of limitation, which now govern the Federal courts in copyright actions, are limitation upon the remedy, and the present bill has been drawn to apply this concept to a uniform Federal period of limitations.” *Zuill*, 80 F.3d at 1369, n. 1 (citing S.Rep. 85-1014, p. 1963 (1957) (emphases added) (noting certain rights “can withstand the statute of limitations”) accord *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 252 (S.D.N.Y. 2000); PATRY § 20:12 (collecting legislative history).

Operating as an impermissible limit on rights in addition to remedies, 507(b) now requires an author to sue infringers within three years of any infringement broad enough to dispute the author’s ownership of copyright in her work. Not only is this test unworkable, in this case it meant petitioner was required to sue within three years of first learning “that [respondent] had copied the Ferrarini Bikini.” (App.15a-16a, 18a) (emphasis added). Such a rule cannot abide.

“If the rule were, as [respondent] urges, sue soon, or forever hold your peace, copyright owners would have to mount a federal case fast.” *Petrella*, 572 U.S. at 682-83. Section 507(b), however, “avoids such litigation profusion” and “allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle.” *Id.*

There is simply no room within the text and history of 507(b) for the lower courts’ laches-like ownership accrual test to bar petitioner’s timely infringement claims. *Petrella*, 572 U.S. at 685 (citing 1 *Dobbs* § 2.6(1), at 152) (Congress secured to authors “a right to sue for infringement occurring no more than three

years back from the time of suit. That regime leaves 'little place' for a doctrine that would further limit the timeliness of a copyright owner's suit.") (emphases added).

The lower court rulings should be reversed and the Court should make clear that *Petrella* remains good law.

II. THE SECOND CIRCUIT'S NEW INFRINGEMENT DEFENSE DEEPENS ITS CONFLICT WITH OTHER CIRCUITS' 507(B) JURISPRUDENCE, MERITING SUMMARY REVERSAL.

Even if this Court finds that the judge-made, laches-like ownership accrual test can be harmonized with *Petrella*, the lower court rulings still merit reversal. The Second Circuit's expansive application of the ownership accrual test to infringement claims brought by an undisputed copyright author against wholly unaffiliated parties expressly conflicts with Sixth Circuit jurisprudence and cannot be reconciled with the foundations of this court-made rule.

Many courts have correctly noted that putative coauthors or co-owners cannot sue one another for infringement at all precisely because they dispute ownership over the same copyright. *E.g.*, *Zuill*, 80 F.3d at 1369. But no circuit until the Second has held that two wholly unaffiliated parties who allege to have independently created substantially similar works at different times can be said to be coauthors or co-owners of the same copyright. *See, infra*, p. 18-19 (App.2a-3a, 12a-18a, 22a-25a).

Such application of the ownership claim accrual test has created a new defense to infringement and runs the risk of unraveling our copyright system by

now impermissibly requiring authors to police all potential infringement in order to protect their ownership rights. *See e.g., H. M. Kolbe Co. v. Armigus Textile Co.*, 315 F.2d 70, 74 (2d Cir. 1963) (holding that copyright owner has no affirmative duty to police subsequent distributions of his own product); *cf. Warren Freedensfeld Assocs., Inc. v. McTigue*, 531 F.3d 38, 46 (1st Cir. 2008) (“Architects have no general, free-standing duty to comb through public records or to visit project sites in order to police their copyrights.”).

In the context of respondents’ arguments, it is perhaps easy to see how the lower courts were led astray, as even copyright treatise authors have struggled with similar fact patterns in the wake of the judge-made ownership claim accrual test. 3 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 12.05(C)(3) (2022) (acknowledging the pitfalls of imposing a “duty to police’ on copyright owners and bar[ring] even infringement claims that have been ongoing, to the extent that they commenced over the three years before filing of suit.”) (footnotes omitted).

Attempting to harmonize section 507(b) ownership claim jurisprudence and reconcile the competing accrual tests, the Sixth Circuit also crafted a “new solution,” *id.*; one that demonstrates the error in the Second Circuit’s approach. In *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), the court reversed the District Court’s application of the separate accrual test to the plaintiff’s infringement claims only because the parties disputing ownership of the copyright in question had been in close relationship:

The district court applied the copyright principle that each new infringing act causes a new three year statutory period to begin.

While this principle does apply to causes of action by an owner against an unknown third party, in closer relationships, such as when the parties are coauthors, the statutory period for any action to establish ownership begins to run whenever there is a “plain and express repudiation” of ownership by one party as against the other. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1230-31 (9th Cir.2000); *Zuill*, 80 at 1369. By applying this approach here, we are extending the current doctrine from coauthors to others in close relationships, such as those who transfer copyright ownership via contract.

Id. at 289, n. 5 (emphasis added).

In 1996, the Ninth Circuit explored the underpinnings for the ownership accrual test, noting that a plaintiff co-owner simply has no right to sue a co-owner for infringement:

The putative co-owners, Mr. Zuill and Mr. Rossi, argue that the statute of limitations cuts off the remedy, but not the right. By that, they mean their right to co-ownership lasts as long as the copyright can—lives of the creators plus fifty years, 17 U.S.C. § 302(b)—and only their remedy for stale infringements would be barred. This argument fails because they have not sued for infringement and could not. They claim to be co-owners with defendants. “A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright.” *Oddo v. Ries*, 743 F.2d 630, 632-33 (9th Cir. 1984). Because a co-owner is an owner, he has a right to use

or license the use of the copyright, and cannot be an infringer: his duty to account to other co-owners for profits arises from equitable doctrines relating unjust enrichment and general principles of co-ownership, and does not amount to an infringement claim. *Id.* at 633. An infringement claim can be brought only against one who violates “the exclusive rights of the copyright owner,” see 17 U.S.C. § 501(a), (b), and an owner does not have rights exclusive of a co-owner’s, so an infringement claim cannot lie against a co-owner.

Because they have no infringement claim, we cannot identify an asserted right of plaintiffs which can withstand the statute of limitations.

Zuill, 80 F.3d at 1369.

The lower court rulings in this case also squarely conflict with Fourth Circuit jurisprudence declining to apply the “ownership dispute” accrual test to infringement claims even in cases where authorship is contested: “to conclude . . . that an infringement claim is time-barred when the underlying authorship claim is time-barred would be to fail to recognize that a new infringement claim accrues every time an infringement occurs.” *Davis v. Meridian Films, Inc.*, 14 F. App’x 178, 182 (4th Cir. 2001).

More recently, the Ninth Circuit extended the ownership accrual test to the successors-in-interest of parties in close relationship, but explicitly declined to extend it further. *Seven Arts Filmed Entm’t, Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1256 (9th

Cir. 2013). In *Seven Arts*, plaintiff entertainment company sought to establish copyright ownership in several motion pictures, asserting that defendant Paramount was its licensee and had been paying distribution receipts to the wrong party. 733 F.3d at 1252. The Ninth Circuit applied the ownership accrual test to affirm the District Court’s ruling that any suit for copyright infringement was time barred because plaintiff’s underlying ownership claim was time barred. *Id.* at 1257. The court dismissed Seven Arts’ concerns that application of the ownership accrual test would “introduce uncertainty” into the jurisprudence and expressly clarified that its holding “did not appl[y] to suits against unknown third parties”:

Seven Arts contends that, even if we follow the Second and Sixth Circuits, our sister circuits’ caselaw is inapposite because Paramount is a “putative downstream, third party licensee” rather than a coauthor or otherwise “in [a] close relationship[], such as those who transfer copyright ownership via contract,” *Ritchie*, 395 F.3d at 288 n.5; *see also Kwan*, 634 F.3d at 226-27 (holding that suit by editor of a book against book’s publisher, who hired her, and author was barred by statute of limitations). Extending *Zuill*’s accrual rule to encompass claims against those who are not in a close relationship could introduce uncertainty into the enforcement of copyrights and require copyright holders to file suit against any third party that might be deemed to have repudiated the copyright owner’s title.

We need not decide which rule applies to suits against unknown third parties. Paramount

and Seven Arts’s predecessors-in-interest were in the sort of “close relationship” envisioned by *Ritchie* and reflected in *Kwan*.

Id. at 1256.

Moreover, no circuit court, other than the one at bar, has applied the laches-like ownership accrual test beyond disputes arising between coauthors, affiliated parties, or their successors-in-interest. *See, e.g., Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020) (creator of copyrighted work, a modified guitar, gave design to a friend who later entered into a deal with a guitar producer to create new instruments based on the design); *Consumer Health Info. Corp. v. Amylin Pharm., Inc.*, 54 F. Supp. 3d 1001, 1008 (S.D. Ind. 2014) *aff’d*, 819 F.3d 992 (7th Cir.), *cert. denied*, 196 L. Ed. 2d 329 (2016) (putative co-owner’s infringement claim barred where one would-be co-owner attempted to “pounce on the prize” of the others’ work after lying in wait seven years); *Gomba Music Inc. v. Avant*, 225 F. Supp. 3d 627, 640-41 (E.D. Mich. 2016) (citing *Seven Arts*, “[t]here may be a good reason to not apply the rule beyond parties in close relationships, such as coauthors or parties in contractual relationships.”); *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013 (10th Cir. 2013) (dismissing as time-barred an ownership claim by an excluded coauthor); *Pritchett v. Pound*, 473 F.3d 217, 220 (5th Cir. 2006) (noting that alleged copyright co-owner’s “declaratory judgment rights accrued when it knew or had reason to know of the injury upon which the claim is based.”).

Indeed, the infringed owner in every case cited by respondents and relied on by the courts below was either a coauthor, in a contractual relationship with the other party, or was a successor-in-interest to the

original co-owner or contracting parties. *See e.g.*, *Charles v. Seinfeld*, 803 Fed. Appx. 550 (2d Cir. 2020) (coauthorship of television show); *Wilson v. Dynatron Publ'g Co.*, 892 F.3d 112 (2d Cir. 2018) (dispute between performance group and publishing companies regarding ownership of musical compositions and related recordings); *Latin Am. Music Co. v. Spanish Broad. Sys.*, 738 F. App'x 722 (2d Cir. 2018) (suit brought by purchasers of copyrights from alleged coauthors of songs); *Simmons v. Stanberry*, 810 F.3d 114 (2d Cir. 2016) (dispute over infringement brought by licensee of a hip-hop beat against the beat's author, another artist who later used the beat, and related companies); *Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*, 716 F.3d 302 (2d Cir. 2013) (work-for-hire agreement between author and publisher); *Kwan*, 634 F.3d 224 (2d Cir. 2011) (coauthorship of a book); *Merchant*, 92 F.3d 51 (2d Cir. 1996) (coauthorship of song); *Cole v. Blackwell Fuller Music Publ'g, LLC*, No. 16 Civ. 7014, 2018 WL 4680989 (S.D.N.Y. Sept. 28, 2018) (dispute between alleged coauthor and publishing company over music compositions); *Ortiz v. Guiana Bros. Music Inc.*, No. 07 Civ. 3897, 2008 WL 4449314 (S.D.N.Y. Sept. 29, 2008) (ownership of musical score that defendants allegedly hired plaintiff to compose); and *Big East Entm't, Inc. v. Zomba Enters., Inc.*, 453 F. Supp. 2d 788 (S.D.N.Y. Sept 28, 2006), *aff'd on other grounds*, 259 F. Appx. 413 (2d Cir. 2008) (dispute between successor companies over allegedly co-published musical compositions).

Importantly, each case also involves disputed ownership over the same copyrighted work or works, not two copyright registrations in two different works. *Id.*; *see* (App.42a-43a, 45a-46a, 52a, 154a-155a, 158a).

In contrast, petitioner and respondents have no prior relationship. Respondents' claim to have independently created a separate infringing work, (App.113a), therefore constitutes either an affirmative defense to infringement or a negation of the essential element of "copying," but it is not and cannot negate petitioner's ownership of her own work *E.g., Repp v. Webber*, 132 F.3d 882, 891 (2d Cir. 1997) ("[I]ndependent creation is an affirmative defense and may be used to rebut a *prima facie* case of infringement."); *Keeler Brass Co. v. Cont'l Brass Co.*, 862 F.2d 1063, 1066-67 (4th Cir. 1988) ("Evidence of independent creation simply tends to prove the reverse of that proposition, *i.e.*, that the design was not copied.") (internal citations and quotations omitted).

While it is true that petitioner must prove "ownership of a valid copyright" as the first element of her infringement claim, *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991), respondents should not be allowed to defeat petitioner's timely infringement claim with the unsupported assertion that they "do[] not concede ownership." *See, e.g., PK Music Performance, Inc. v. Timberlake* (S.D.N.Y. Sep. 30, 2018, No. 16-CV-1215 (VSB) at *15, quoting *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 80 F. Supp. 3d 535, 543 (S.D.N.Y. 2015) ("[A] defendant may not convert an infringement claim into an ownership claim 'by asserting unsupported defects in ownership.'")).

Imagine the facts of *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983). In *Bright Tunes*, the court held it was clear that George Harrison's 1970 song, "My Sweet Lord," was "the very same song"

as the 1962 hit “He’s So Fine,” composed by George Mack. 420 F.Supp. at 181. George Harrison denied copying but acknowledged he had heard “He’s So Fine” before creating “My Sweet Lord.” *Id.* at 180. The Court found infringement because the substantial similarity of the songs combined with Harrison’s proven access is, “under the law, infringement of copyright, and no less so even though subconsciously accomplished.” *Id.* at 181.

If Harrison had refused to concede, like respondents in this case, that Bright Tunes owned “He’s So Fine,” he could have prevented the infringement suit outright—without ever having to prove “He’s So Fine” was not validly owned. Even though his access to the original song and (subconscious) copying were clear, *id.* at 181, under the lower courts’ decisions in this case, a bare assertion that “He’s So Fine” lacked copyrightability, when combined with Harrison’s claim to have created “My Sweet Lord,” would have converted Bright Tune’s infringement suit into a time-barred “ownership claim,” giving Harrison a complete defense and freedom to infringe indefinitely.

The lower courts’ application of such faulty logic in this case threatens to turn many such clear infringement suits into time-barred ownership claims.

III. THIS COURT SHOULD NOT ALLOW INDIVIDUAL JUDGES TO SET A TIME LIMIT FOR INFRINGEMENT CLAIMS OTHER THAN THE ONE CONGRESS PRESCRIBED.

Uniformity is particularly important in the copyright context, as “[i]nconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.” *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 890 (9th Cir. 2005). Moreover, “[allowing] individual judges to set a time limit [for infringement claims] other than the one Congress prescribed, we note, would tug against the uniformity Congress sought to achieve when it enacted § 507(b).” *Petrella*, 572 U.S. at 680-81.

This court should reverse the lower court rulings and realign the Second Circuit’s copyright jurisprudence with her sister circuits which limit application of the ownership claim accrual test to coauthors or parties in some close or legal relationship. *See supra*, p. 17-18; *see also Kling v. Hallmark Cards, Inc.*, 255 F.3d 1030, 1038 (9th Cir. 2000) (“The ownership of intellectual property is frequently a subject of dispute. To require every owner whose right was not ‘obviously’ established to sue for a declaration of ownership whenever a dispute arises or to forfeit his right to seek relief against possible infringements in the future, would engender much needless litigation.”); *see, e.g., Porter v. Combs*, 105 F. Supp. 3d 872, 876-77 (N.D. Ill. 2015) (denying a motion to dismiss a timely infringement claim which the defendants sought to characterize as a time-barred ownership claim) (“[Defendants] contend [plaintiff’s] claims are in actuality claims disputing the

ownership of the logo design copyright. Defendants continue that, where a dispute over copyright ownership masquerades as an infringement claim, the limitations period does not follow the ‘separate accrual’ rule, but instead runs from the date that [plaintiff] knew of the contested ownership Although defendants try mightily to portray this as a dispute over ownership, the allegations . . . claim unauthorized copyright use, not ownership. And [defendants’ misrepresentations] in and of themselves do not convert [plaintiff’s] infringement claims to a dispute in ownership.” (emphasis in original).

Alternatively, this Court should reject the lower courts’ laches-like accrual test for ownership claims in its entirety as it fails to respect the constitutional principles at play in the Copyright Act.

“Applying section 507 to deprive petitioner of sole authorship would effectively make a joint author out of a party who is constitutionally incapable of being one. Although the inquiry into whether a coauthor contributed expression may make it less clear who owns copyright in some situations, the constitutional limitation on copyright vesting only in authors is certainly more important than the desire to quiet title.” PATRY, § 20:39 (emphasis added).

The treatise later poses a scenario that greatly resembles the present matter:

[A]ssume two individuals, A and B, both claim rights in the same work. A claims sole authorship and is aware that B is also claiming sole authorship, but does nothing for four years because the work isn’t being exploited. In the fourth year, a third party infringes the

work. B brings an infringement action and A seeks to intervene. B opposes the intervention because he claims A is barred from asserting ownership rights. While the action is one for infringement, the dispute between A and B doesn't turn on the infringement. Under *Zuill-Merchant*, it is uncertain whether A would be barred from intervening, and the uncertainty is the direct result of the questionable distinction drawn between infringement and ownership for statute of limitations purposes. . . .

Id. (emphases added)

The Court should grant this petition and clarify the uncertainty all authors now face.



CONCLUSION

Petitioner respectfully requests that the Court summarily reverse the judgment below or, in the alternative, grant her petition and call up this matter for hearing so that the fog of uncertainty currently blanketing 507(b) jurisprudence can be cleared and the rights of authors everywhere protected and secured as Congress and this Court intended.

Respectfully submitted,

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October 20, 2022