No. 23-474

IN THE

Supreme Court of the United States

HEARST NEWSPAPERS, L.L.C. &
HEARST MAGAZINE MEDIA, INC.,

Petitioners,

v.

ANTONIO MARTINELLI,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Antonio Martinelli respectfully submits that the petition for a writ of certiorari should be denied.

Petitioners Hearst Newspapers, LLC and Hearst Magazine Media Inc. (together "*Hearst*") have failed to present a "compelling reason" for the Court to grant their Petition for a Writ of *Certiorari* ("Petition"). *See* Sup. Ct. R. 10. Petitioners argue that the Fifth Circuit, in upholding the district court's decision, has decided an important federal question in a way that conflicts with relevant decisions of this Court, and that the Court should therefore grant certiorari and hold that the discovery rule does not apply to the Copyright Act's statute of limitations for civil claims. Petitioner specifically identifies Sup. Ct. R. 10(c) as the relevant consideration for its Petition (Pet. 8).

However, as set forth herein, the Fifth Circuit Opinion did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10. The cases cited by Petitioners in favor of an injury rule are out of context, and involve various other federal statutes which are plainly distinguishable from the statutory language of the Copyright Act's civil statute of limitations. 17 U.S.C. 507(b). Additionally, while this Honorable Court has twice had the opportunity to do so, it twice explicitly advised it had not passed on the question of whether the discovery accrual rule applies to civil

copyright claims.[1] Simply, this Court has never "rejected" (expressly or otherwise) the unanimous Circuit-level precedent, and should decline to do so now.

In *Nealy v. Warner Chappell Music, Inc.*, No. 21-13232, 60 F.4th 1325 (11th Cir. Feb. 27, 2023) cert. granted in part, *Warner Chappell Music, Inc. v. Nealy*, No. 22-1078, --- S.Ct. --- (docketed May 5, 2023), which is scheduled for argument before this Court in February 2024, it appears the Court is passing on the question for a third time. In *Warner Chappell Music*, the Court granted the petition in part, limited to the following question: "[w]hether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. §507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit." Such limitation by the Court presumes that the Copyright Act contains a discovery accrual rule applied by the Circuit Courts.

Further, the Fifth Circuit's opinion in this case ("Opinion") does not involve "an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10. That is because the application of the discovery accrual rule to civil copyright claims is not a newly decided question of federal law by the Fifth Circuit. Rather, all eleven Circuit Courts of Appeal have uniformly held that the discovery rule *does* apply to the Copyright Act's

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[1] *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 134 S. Ct. 1962, 188 L. Ed. 2d 979 (2014) and *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019).

statute of limitations, since at least as early as 1983. *See Taylor v. Meirick*, 712 F.2d 1112, 1117-18 (7th Cir. 1983). Accordingly, Hearst's assertion in the Petition that the discovery rule has led to a circuit split or inconsistent rulings (Pet. 2) is a gross misstatement of fact and law which directly bears on the issue before the Court if certiorari were granted. *See* Sup. Ct. R. 15.2.

Likewise, the statutory text, structure, policy considerations and legislative history of the Copyright Act and the civil statute of limitations provision under 17 U.S.C. 507(b) fully support the application of a discovery rule to civil copyright claims.

Accordingly, this Court should find there is no compelling reason to grant the Petition. If the Court were to grant the petition and jettison the discovery rule, it would conflict with and upend the historical, undivided and authoritative decisions of all eleven United States Courts of Appeals that have for decades consistently applied the discovery accrual rule to civil copyright infringement claims. As Hearst points out, when Congress wants the statute of limitations to run from an ambiguous (accrue) or unambiguous (occur) date, it knows how to draft such a statute. Pet. 11. Therefore, Congress can revise the statutory language and define when copyright claims accrue should it choose to do so. Notably however, Congress has declined to disturb the application of the discovery accrual rule since Circuit Courts began applying the rule at least four decades ago. For these reasons, and those more fully set forth below, respectfully this Court has no compelling reason to disturb unanimous precedent and should therefore deny the Petition and leave the issue to be addressed by Congress.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Correct.

In the Opinion, the Fifth Circuit panel analyzed six decisions from the Fifth Circuit that applied the discovery rule to the accrual of copyright infringement claims. Hearst did not dispute the Fifth Circuit's precedent in applying the discovery rule, but took issue that the decisions do not explain why the discovery rule applies. Notwithstanding, the panel found that *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 393 (5th Cir. 2014) "is the only precedent binding this court to apply the discovery rule" to copyright infringements claims, even though *Graper* does not explain why the discovery rule applies. App. 5a-6a, 10a. Accordingly, the Opinion undeniably maintains uniformity within the Fifth Circuit as well as all ten other Circuit Courts of Appeal who have all adopted the discovery rule for civil copyright claims.

Hearst goes on to claim that the Opinion did not endorse the discovery rule, but rather "simply followed the circuit court's rule of orderliness, reasoning that its prior precedent had not been 'unequivocally overrule[d]' by recent Supreme Court precedent." Pet. 6. However, Hearst cannot point to any portion of the Opinion which indicates that the panel endorses the injury rule instead of the discovery rule. In fact, an examination of the Opinion reveals that the unanimous panel does uphold, or at the very least approves of, the continued application of the discovery rule. See Opinion (App. 11a), stating, "*Petrella* and *Rotkiske* leave open the possibility that in a later case, the Supreme Court might decide that the discovery rule does apply to § 507(b)." The panel

further notes, in analyzing *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC,* 580 U.S. 328, 137 S. Ct. 954, 962, 197 L. Ed. 2d 292 (2017), that the Supreme Court "later confirmed that *Petrella* didn't disturb the discovery rule" (App. 13a); and "left open the possibility that at the time of § 507(b)'s enactment, a copyright infringement claim accrued like claims arising from 'latent disease and medical malpractice' which are 'unknown or unknowable until the injury manifests itself' and for which the Court has 'recognized a prevailing discovery rule,'" citing *TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) and *Rotella v. Wood*, 528 U.S. 549, 556 (2000). App. 15a.

At the very least, Hearst misconstrues and oversimplifies the Fifth Circuit's thorough and well-reasoned Opinion for the continued application of the discovery rule.

II. The Circuit Court's Application of the Discovery Rule in the Context of Copyright Infringment Claims Does Not Conflict With Any Relevant Precedent of this Court.

In analyzing the meaning of "accrue", Hearst argues that language and reasoning in various Supreme Court cases leads to the conclusion that the Supreme Court rejects a presumed blanket application of a discovery rule to statutes of limitation[2]. However, as pointed out by the Fifth

[2] Martinelli does not argue for a default presumption that all federal limitations periods run from the date of discovery.

Circuit, Hearst misconstrues and overstates the extent to which these Supreme Court decisions govern the Fifth Circuit's interpretation of the Copyright Act. App. 14a, 17a.

First, in evaluating *Rotkiske,* the Fifth Circuit found that "contrary to Hearst's position, *Rotkiske* did not introduce a clear statement rule that a limitations period runs from the occurrence of the injury unless the statute expressly says that the discovery rule applies." Rather, the Fifth Circuit found that *Rotkiske* identified how to resolve the limitations question when the limitations period is either unambiguous or ambiguous, but "did not describe how to analyze every statute of limitations in the U.S. Code" and "did not survey when courts might permissibly adopt an alternative construction." App. 19a. Continuing, the Fifth Circuit explained that *Rotkiske* did not address the scenario when - as here in the context of the Copyright Act - the "statutory language describing the limitations period might be ambiguous, yet the only plausible construction might be that the discovery rule applies." The Fifth Circuit further observed that *Rotkiske* "did not hold that any ambiguity forecloses the application of a discovery rule" or that "the only way that Congress can signal a discovery rule is by using the word 'discover.'" *Id*.

The Opinion goes on to address the glaring distinction between the unambiguous language used in the FDCPA's statute of limitations ('date on which

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Martinelli asserts that the discovery rule (as supported by precedent, legislative history, statutory construction and policy) applies to the accrual of a civil copyright infringement claim.

the violation *occurs*") from the ambiguous language found in the Copyright Act ("within three years after the claim *accrued;*" 17 U.S.C. § 507(b)) (emphasis added). *Rotkiske's* decision to and reason for rejecting the application of the discovery rule to the unambiguous FDCPA statutory language cannot be used to implicitly overrule the Circuits' adoption and precedential application of the discovery rule to the Copyright Act. That is because the Copyright Act involves issues and subject matter distinct from the FDCPA[3]. App. 20a, citing *Gahagan v. United States Citizenship & Immigr. Servs.*, 911 F.3d 298, 302-303 (5th Cir. 2018).

Likewise, in evaluating *Petrella's* general statements about statutes of limitation and articulation of when claims generally accrue, the Fifth Circuit found that *Petrella's* statements do not lead to the conclusion that the discovery rule does not apply. App. 14a[4]. Instead, the Fifth Circuit found that

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[3] *See generally, Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014); holding that "the text and structure of the Copyright Act, unlike the FCRA, evince Congress's intent to employ the discovery rule, not the injury rule," and concluding that "the Supreme Court's decision in *Gabelli v. S.E.C.,* which held, in the readily distinguishable context of securities law, that 'the standard rule is that a claim accrues when the plaintiff has a complete and present cause of action,' —— U.S. ——, 133 S.Ct. 1216, 1220, 185 L.Ed.2d 297 (2013), does not bar application of the discovery rule where precedent, structure and policy all favor such a rule."

[4] Similarly, the *Nealy* Court held: "We cannot read a court's opinion like we would read words in a statute. Instead, when interpreting and applying words in a judicial opinion, we must consider the context, such as the question the court was answering, the parties' arguments, and facts of the case." *See Nealy v. Warner Chappell Music, Inc.*, 60 F.4th at 1332,

"*Petrella's* general statements about statutes of limitation and the separate-accrual rule leave room for caselaw holding that the discovery rule applies to § 507(b)." *Id*.

The Fifth Circuit's interpretation of *Petrella* is in harmony with the recent Eleventh and Ninth Circuit decisions in *Nealy* and *Starz*, where the Circuit Courts noted that the context and language in the *Petrella* decision matters. *See Nealy*, FN 3, *supra*; *see also Starz*, 39 F.4th at 1237-8 (explaining that since the 2014 *Petrella* decision addressing the "interplay between § 507(b) and the doctrine of laches", "defendants accused of copyright infringement have seized upon certain language in *Petrella* to argue that the Court also did away with the discovery rule").

Hearst is a prime example of another defendant purposefully seizing upon selective language in *Petrella* and other intervening Supreme Court decisions to fit its narrative; that the discovery rule does not apply. Hearst cites language from *Petrella* out of context from the specific issue decided there, *i.e.*, whether a laches defense could bar claims of infringement that accrued within the three-year window of § 507(b). *Starz*, 39 F.4th at 1241. Furthermore, Hearst understates or omits entirely the important qualifying language used by *Petrella* in its general discussion of when an infringment claim accrues. *Petrella*, 572 U.S. at 670 ("A claim *ordinarily* accrues when a plaintiff has a complete and present

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explaining that the "question in *Petrella* was whether the equitable defense of laches (unreasonable, prejudicial delay in commencing suit) may bar relief on a copyright infringement claim brought within § 507(b)'s three-year limitations period.'" (internal citations omitted).

cause of action. In other words, the limitations period *generally* begins to run at the point when the plaintiff can file suit and obtain relief." (citations omitted and emphases added)); *id*. at 672 ("the copyright holder's suit *ordinarily* will be timely under § 507(b) with respect to more recent acts of infringement (i.e., acts within the three-year window), but untimely with respect to prior acts of the same or similar kind" (emphasis added)); *id*. at 682 ("That is so *here*, because the statute, § 507(b), makes the starting trigger an infringing act committed three years back from the commencement of suit, *while laches*, as conceived by the Ninth Circuit and advanced by MGM, makes the presumptive trigger the defendant's *initial* infringing act" (emphases added)).

Critically, *Petrella* preserved the discovery rule by highlighting the caselaw and absolute uniformity among the Circuit Courts of Appeal as to their adoption of the discovery rule, found no fault with the referenced Circuit Court decisions, and did not otherwise comment on or suggest that such decisions were in any way erroneous. To that end, those decisions were not unequivocally overruled and remain undisturbed by *Petrella.*

For these reasons, the Fifth Circuit correctly found that neither *SCA Hygiene,* nor *Petrella* nor *Rotkiske* unequivocally overruled any Fifth Circuit precedent, or any other Circuit precedent for that matter.

III. Lower Court Decisions are Uniform and There is No Circuit Split Warranting This Court's Review.

Certiorari is "granted 'only for compelling reasons,' which include the existence of conflicting decisions on issues of law among federal courts of appeals and state courts of last resort." *City & Cnty. of S.F., Cal. v. Sheehan*, 575 U.S. 600, 619 (2015) (Scalia, J., concurring in part and dissenting in part) (quoting Sup. Ct. R. 10). "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head." *See Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (writ of certiorari dismissed as improvidently granted where there was no conflict).

Hearst asserts it is important for the Court to grant certiorari because this case "presents an alternative approach to resolving the conflict among the circuits that has erupted after *Petrella*, and which the Court is slated to consider this Term," referring to *Nealy*/*Warner Chappell Music*. Pet. 7. As aforenoted, there is no conflict amongst any of the Circuits, yet Hearst seeks to create one relating to the application of the discovery accrual rule in order to induce this Court to grant certiorari. See Pet. 17, Point C ("The Circuit Courts' refusal to jettison the discovery rule has led to the split at issue in *Warner Chappell Music*"); *id.* ("the underlying cause of the split is the circuits' continued adherence to the discovery rule");

id. at 3 ("But the circuit split at issue in *Warner Chappell Music* is the symptom—not the problem. This Court should fix the problem, which was not litigated below in *Warner Chappell Music*. *Hearst v. Martinelli* is the ideal vehicle to consider whether the discovery rule applies. This case should be considered together with *Warner Chappell Music*").

Yet, Hearst then curiously acknowledges that the question over which the Circuits are at odds concerns the available *damages* under the discovery accrual rule, and not the discovery rule itself. Pet. 2. The question presented in *Warner Chappell Music*, as rephrased by the Court, assumes that the Copyright Act contains a discovery accrual rule applied by the Circuit Courts. Order, *Warner Chappell Music*, No. 22-1078 (Sept. 29, 2023). Regardless, the damages issue in *Warner Chappell Music* is not at issue in this case. Accordingly, there is no reason for the Court to grant the Petition and consider the cases together.

Rather, there simply is no intercircuit conflict. All Circuits that have addressed the issue of when a civil copyright cause of action accrues have for decades applied the discovery rule in determining the time at which the statute of limitations begins to run. This was highlighted by the Fifth Circuit, concluding that "were 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*. We are always chary to create a circuit split, including when applying the rule of orderliness, and we decline to do so in this case." App. 25a, citing *Gahagan*, 911 F.3d at 304 (internal citations and quotations omitted). Here, because there is no "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals,"

(which is not already being addressed by the Court in *Warner Chappell Music*) there is no compelling reason to grant certiorari on this case. *See Layne & Bowler Corp.*, 261 U.S. at 393.

While the Second Circuit may have adopted a divergent view as to how damages are calculated in infringement cases, it nonetheless continues to apply the discovery rule to the accrual of claims, as does every other Circuit. Any contrast between the Second and Ninth Circuit's approaches on the calculation of damages is irrelevant as the damages amount was stipulated to by the parties and is not in issue in this case. Moreover, Hearst's assertion that the discovery rule caused the deviation by the Second Circuit in *Sohm* as to damages is incorrect. As discussed above, the out of context interpretation of *Petrella* caused the deviation by one Circuit. *See Nealy*, FN 3, supra. Finally, the issue in *Warner Chappell Music* has already been fully briefed and is scheduled for argument before the Court in February 2024.

Hearst next argues that the "lower courts are not correctly applying the cited Supreme Court precedent (if they consider it at all) to the Copyright Act" and instead are reflexively applying the discovery rule to a statute of limitations with no discovery rule provision," for no stated reason[5]. See Pet.13-17, Point

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[5] Citing cases *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994); *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020); *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124-25 (2d Cir. 2014). *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1015-16 (10th Cir. 2013); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 434 (3d Cir. 2009); *Comcast of Ill. X v. MultiVision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Santa-*

B. Yet, Hearst then describes the reasons discussed in those cases, *i.e.*, the Ninth Circuit's consideration of equitable tolling doctrines and equitable reasons, the Third Circuit's analysis of the difference between the Copyright Act's criminal statute of limitations, 17 U.S.C. 507(a) ("5 years after the cause of action *arose*" (emphasis added)), and its civil statute of limitations, 17 U.S.C. 507(b) ("three years after the claim *accrued*" (emphasis added)), and the Second Circuit's analysis of the text and structure of the Copyright Act and policy considerations. Pet. 15-17. Moreover, as more fully discussed below at Point IV, *infra*, the consistently applied Circuit level precedent adopting the discovery accrual rule is wholly in line with the legislative history of and public policy supporting the Copyright Act. In fact, Congress has amended the Copyright Act (including 17 U.S.C. 507) numerous times since the Courts began applying the discovery accrual rule to copyright infringement claims decades ago, yet Congress has not revised 17 U.S.C. 507(b). *See infra*, Point IV.

However, the fact that Hearst simply does not like the reasons given or is dissatisfied with the brevity of the Circuits reasoning does not warrant the granting of certiorari and this Court's review. Essentially, Hearst is asking this Court to expunge forty years of Circuit level precedent which has consistently applied the discovery accrual rule. There is no compelling reason for this Court to do so. *See Layne & Bowler Corp.,* 261 U.S. at 393 ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of

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Rosa v. Combo Recs., 471 F.3d 224, 227-28 (1st Cir. 2006); *Taylor v. Meirick*, 712 F.2d 1112, 1117-18 (7th Cir. 1983).

which is of importance to the public, *as distinguished from that of the parties*, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" (emphasis added). Even if there were erroneous factual findings or misapplication of a properly stated rule of law, which there is not, "a petition for a writ of certiorari is rarely granted" for such asserted errors. *City & Cnty. of S.F., Cal.* 575 U.S. at 619; *id.* at 621 ("[W]e are not, and for well over a century have not been, a court of error correction"); *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019) ("[T]his Court is not in the business of writing new statutes to right every social wrong it may perceive").

IV. The Discovery Rule is Consistent with the Legislative History, Statutory Construction and Intent of the Copyright Act.

At Point D, Hearst asserts that the discovery rule leads to inconsistent rulings, contrary to the intent of the drafters of the Copyright Act. Pet. 19. As an initial matter, the analysis under the discovery accrual rule of when a plaintiff discovered, or with reasonable diligence, should have discovered, the alleged act of infringement, is not a dispute that was raised by Hearst at the district or Circuit level and is not properly before this Court. That is because the parties specifically stipulated that Martinelli discovered Hearst's infringing uses on various dates ranging from November 17, 2018 through May 28, 2020, and Martinelli could not have, through reasonable diligence, discovered the uses before those dates. Pet. 5; App. 2a-3a. Therefore, Hearst's discussion of the decisions analyzing the "reasonable diligence"

standard (primarily at the district level) and any purported variations among the districts is irrelevant to the question presented here ("[w]hether the "discovery rule" applies to the Copyright Act's statute of limitations for civil claims") and should be disregarded. Hearst is precluded from raising this issue for the first time in this Petition and fails to identify conflicting decisions on issues of law among *federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort* (emphases added). *See* Sup. Ct. R. 10. Accordingly, since Hearst does not assert any split among Circuit level decisions regarding the "reasonable diligence" standard, and Respondent is not aware of any, this question is not properly before this Court for consideration.

Hearst next argues that the Legislative history offers no support for the discovery rule because (1) the House Judiciary Committee agreed to a three-year uniform period; and (2) the time to locate the infringement is baked into the three-year period. Pet. 21-22. However, a review of the Legislative history does not establish that the discovery rule is inconsistent with the legislative intent, as Hearst suggests.[6]

To the contrary, while the Committee agreed that

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[6] *See* Br. of Amici Curiae The Authors Guild, Inc. and Other Artists' Rights Organizations in Sup. Of Respondents, *Warner Chappell Music*, No. 22-1078 (January 12, 2024) (discussion of text and structure of the Copyright Act and public policy considerations supporting the continued application of the discovery rule); *see also,* Br. of Amici Curiae Former Register of Copyrights Ralph Oman, *Warner Chappell Music*, No. 22-1078 (January 12, 2024) (same).

a three-year statute of limitations was an appropriate period for civil copyright actions, it declined to include a specific tolling provision in the statute. In the Senate Report commentary, the Committee concluded that specifically enumerating various equitable situations that would suspend the statute of limitations was unnecessary. However, Hearst ignores the Committee's further observation that "*Federal District Courts, generally, recognize these equitable defenses anyway*. This Committee concurs in that conclusion." 1957 U.S.C.C.A.N. 1961, 1963. Stated otherwise, the Committee recognized that the Federal District Courts were taking equitable arguments into consideration and declined to deprive the Federal Courts of the discretion to do so, where and when appropriate.

Moreover, the statutory construction of the civil copyright statute of limitations, in comparison to the criminal statute, reflects Congress' intent to express a different meaning to the civil statute. The conscious decision by Congress to specifically use "accrue" for the civil Copyright Act rather than continuing to use "arose" as it did under the criminal statute (embodying the injury rule) establishes that the civil act's discovery rule is plainly supported by the statutory structure and legislative history.

In *William A. Graham*, 568 F.3d at 434-435, the Third Circuit juxtaposed the use of the word "arose" in the copyright criminal statute, versus "accrue" in the civil statute. "Given the maxim of statutory construction that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Id*. (citing *Sosa v. Alvarez–*

Machain, 542 U.S. 692, 711 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004)) (quotation omitted).

The *William A. Graham* Court analyzed the specific terms used in the criminal and civil statutes, with other statutes utilizing those specific terms and found that because "Congress provided no directive mandating use of the injury rule to govern the accrual of claims under the Copyright Act . . . use of the discovery rule comports with the text, structure, legislative history and underlying policies of the Copyright Act."[7] *Id.* Accordingly, the Congressional use of "accrue" does not automatically equate to an injury rule, as Hearst suggests, but plausibly permits an alternate construction such as the discovery rule. App. 19a.

Hearst goes on to argue that "Congress, in enacting the 1976 Act, would have been aware of this case law interpreting the word "accrue" under the prior Act. It could have added a discovery rule. See *supra* note 4.

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[7] As per the *Starz* decision, the Ninth Circuit has applied the discovery rule in copyright infringement claims since 1994. *Starz Ent.,* 39 F.4th at 1240. From a policy perspective, because of the vast difficulty of finding infringements on-line, publication on the internet is functionally equivalent to "concealment." *See Starz Ent.,* 39 F.4th at 1246, citing Br. of Amici Curiae The Authors Guild, Inc. and Other Artists' Rights Organizations in Sup. Of Pl.-Appellee & Affirmance at 3: "As amici argue, with the constant evolution of technology, copyright infringement is now "easier to commit, harder to detect, and tougher to litigate." *See also William A. Graham*, 568 F.3d at 437 ("Technological advances such as personal computing and the internet have [made] it more difficult for rights holders to stridently police and protect their copyrights.") In the face of these technological advances, upholding the discovery rule is essential in the enforcement of a copyright holder's rights.

It did not do so." Pet. 23. To support its assertion that Congress did not intend for a discovery rule to apply to civil copyright matters, Hearst references various other federal statutes where Congress specifically drafted a discovery rule into the language of the statute of limitations. Pet. 11, fn. 3. However, every example in footnote 3 contains an unambiguous accrual date such as the "date on which the violation *occurs*" or the "date of the *act* complained of." Notably, Hearst provides no examples of a federal statute comparable to the Copyright Act's statute of limitations which includes the ambiguous term "after the claim *accrued*".

Curiously, Hearst provides no discussion of the fact that Congress has indeed amended the Copyright Act numerous times since the Circuit Courts began applying a discovery accrual rule, and that certain of those contemporaneous amendments to Title 17 included an express injury rule. By way of example, Section 507 was amended in December 1997 and October 1998. See Pub. L. No. 105-147, § 2(c), 111 Stat. 2678, 2678 (1997); Pub. L. No. 105-304, § 102(e), 112 Stat. 2860, 2863 (1998). The 1997 amendment revised Section 507(a)'s criminal statute of limitations provision by striking "three" years and increasing the statute of limitations to "5" years after the cause of action arose. The 1998 amendment also revised Section 507(a)'s criminal statute of limitations provision by inserting "Except as expressly provided otherwise in this title, no".

During the same year that Congress revised Section 507(a) without disturbing Section 507(b)'s "accrual" language, the Digital Millennium Copyright Act of 1998 ("DMCA") was enacted and included the

"Protection of Original Designs" under Chapter 13. For that Chapter, Congress expressly adopted an injury rule for the accrual of the limitations period in 17 U.S.C. § 1323(c) which reads "[n]o recovery under subsection (a) or (b) shall be had for *any infringement committed* more than 3 years before the date on which the complaint is filed" (emphasis added). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *See Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 174 (2009). If Section 507(b) is interpreted to solely embody an "injury" rule as Petitioners argue, then Congress' inclusion of the express injury rule in 17 U.S.C. § 1323(c) would be redundant. This Court has warned that that sort of interpretation is to be avoided. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("the cardinal rule just stated, the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."); *Yates v. United States*, 574 U.S. 528, 543 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").[8]

Similarly, Congress is presumptively aware of the judicial application of the discovery rule by all Federal

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[8] Other amendments to the Copyright Act include, but are not limited to, the length of the copyright term (Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)); as well as other clarifications and corrections to Title 17 (Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No. 111-295, 124 Stat. 3180). *See* U.S. Copyright Office, Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code viii-xv (2022), https://www.copyright.gov/title17/title17.pdf.

Circuit Courts. Yet, despite many opportunities to revise the Copyright Act's civil statute of limitations, or provide clarification, or add in a discovery or injury rule, Congress has not seen fit to change the statute. "The long-time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940); *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Accordingly, Congress has effectively adopted the judicial interpretation of what constitutes accrual of a claim under the civil copyright statute of limitations, which includes the discovery accrual rule.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January 17, 2024

Respectfully submitted,

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