

No. 24-768

In the Supreme Court of the United States

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC.,
RUTHIE ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,
Petitioners,

v.

MICHAEL GRECCO PRODUCTIONS, INC.,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF OF MCHALE & SLAVIN, P.A., AS
AMICUS CURIAE IN SUPPORT OF
PETITIONERS**

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QUESTION PRESENTED

Whether a claim “accrue[s]” under the Copyright Act’s statute of limitations for civil actions, 17 U.S.C. 507(b), when the infringement occurs (the “injury rule”) or when a plaintiff discovers or reasonably should have discovered the infringement (the “discovery rule”).

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**BRIEF OF MCHALE & SLAVIN, P.A., AS
AMICUS CURIAE IN SUPPORT OF
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INTEREST OF *AMICUS CURIAE*

MCHALE & SLAVIN, P.A., is a Florida professional association of intellectual property attorneys that represents parties in all aspects in intellectual property protection, including as counsel for both plaintiffs and defendants in copyright infringement litigation.¹ Attorneys for the firm regularly litigate intellectual property cases in trial and appellate courts and teach intellectual property courses. Many of the firm’s cases

¹ *Amicus* provided 10-day notice of intent to file this brief to counsel of record for both parties. No counsel for any party authored this brief, in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

and research have focused on issues related to the so-called “discovery rule,” used by plaintiffs to pursue copyright infringement claims for acts of alleged infringement which only occurred far more than three years prior to the suit being filed, cases where evidence of what occurred at that time may have been lost due to the passage of time. That issue is increasingly more common, particularly with photography infringement claims based on a single image posted, and archived, on the Internet. Consequently, attorneys at the firm have developed a particular expertise in the nuances of the issues addressed by the question presented in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

A. For over one hundred and forty-five years this Court has recognized the “vital” role statutes of limitations play in the law and for society:

Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying evidence of rights, they supply in its place a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed is a conclusive bar. The bane and antidote go together.

Wood v. Carpenter, 101 U.S. 135, 139 (1879); *see also Gabelli v. S.E.C.*, 568 U.S. 442, 448-49 (2013) (“They

provide ‘security and stability to human affairs.’ *Wood*[, 101 U.S. at 139]. We have deemed them ‘vital to the welfare of society,’ *ibid.*, and concluded that ‘even wrongdoers are entitled to assume that their sins may be forgotten,’ *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).”). Employing the so-called “discovery rule” to determine when copyright infringement claims “accrue”—at least in application—destroys that “vital” role and disregards Congress’s reasoned judgment in enacting the statute of limitations in the Copyright Act of 1976, 17 U.S.C. §101 et seq. (“Copyright Act” or “Act”).

Section 507(b) of the Copyright Act codifies a three-year window for a copyright holder to file suit based on *the occurrence* of an infringing act. 17 U.S.C. §507(b). But that three-year window occurs for *each* infringing act. *Petrella v. MGM*, 572 U.S. 663, 671 (2014) (“Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs.”). That scheme balances the equities: an infringer profiting from another’s work will almost certainly continue committing separate acts of infringement and will therefore be subject to suit, while a party that innocently (or accidentally) infringed or who committed only a single act (or limited series) of infringement will be entitled to forgiveness. See *Wood*, 101 U.S. at 139; see also *Gabelli*, 568 U.S. at 448-49 (quoting *Wilson*, 471 U.S. at 271).

B. The question presented in the petition challenges the Second Circuit’s application of the so-called “discovery rule” to determine when copyright infringement claims accrue, asking: “Whether a copyright infringement claim ‘accrue[s]’ under the Copyright Act’s statute of limitations when the injury occurs (the

‘injury rule’) or when a plaintiff discovers or reasonably should have discovered the infringement (the ‘discovery rule’).” Pet. (i). The Second Circuit is not alone in applying a “discovery rule” to determine copyright infringement claim accrual, but such application is not uniform—despite conventional wisdom.

The Third Circuit, the only circuit to analyze the statutory text, holds that “the ‘accrual’ of a cause of action occurs at the moment at which each of its component elements has come into being as a matter of objective reality, such that an attorney with knowledge of all the facts could get past a motion to dismiss for failure to state a claim.” *William A. Graham Co. v. Haughey*, 646 F.3d 138, 150 (CA3 2011) (“*Graham II*”). But even in recognizing that the “discovery rule” does not affect claim “accrual,” it applies a “discovery rule” “in applicable cases to toll the running of the limitations period.” *Id.* at 150-51; *id.* at 146 (discussing *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433-41 (CA3 2009) (“*Graham I*”).

More recently, Judge Murphy of the Sixth Circuit has written concurrences to address the errors in reasoning that has resulted in a “discovery rule.” See, e.g., *Everly v. Everly*, 958 F.3d 442, 459-68 (CA6 2020) (Murphy, J., concurring) (identifying and analyzing mistakes in circuit precedents that apply a “discovery rule” to copyright claims). Analyzing this Court’s precedent, Judge Murphy correctly concludes that a “discovery rule” is inconsistent with the statutory text and this Court’s precedent. *Id.* at 461 (Murphy, J., concurring) (“Here, the Copyright Act’s statute of limitations can at least plausibly be read to use an occurrence rule. That should end the matter.”); *id.* at 468 (Murphy, J., concurring) (“When some law-making bodies “get into grooves,” Judge Learned Hand used to

say, “God save” the poor soul tasked with “get[ting] them out.” *United States v. Jeffries*, 692 F.3d 473, 486 (6th Cir. 2012) (Sutton, J., dubitante) (quoting Learned Hand, *The Spirit of Liberty* 241-42 (2d ed. 1954)). I fear the courts have gotten into such a ‘groove’ in this copyright context.”).

C. The importance of the Copyright Act’s statute of limitations was apparent last term in *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024), where, despite presenting the distinct question of whether there was three-year damages bar *independent* from the statute of limitation, briefing and arguments focused “almost entirely” on this antecedent question of whether the Copyright Act embodied a “discovery rule” at all. See *id.* at 371 n.1. The majority correctly held that the Act did not embody a *separate* damages limitation, taking care to explicitly and repeatedly clarify that it was not passing on the antecedent question of whether the Act embodied a “discovery rule.” See *id.* at 368, 371; *see also id.* at 374 (Gorsuch, J., dissenting) (“Rather than address [whether the Copyright Act embodies a discovery rule], the Court takes great care to emphasize its resolution must await a future case.”)

Although three Justices dissented in *Warner Chappell*, the dissent was not a disagreement with the majority’s reasoning or the outcome of the decision, but because it was so clear that the Copyright Act “does not tolerate a discovery rule,” those Justices would simply have dismissed the petition as improvidently granted, explaining that “that fact promises soon enough to make [the Majority opinion] about the rule’s operational details a dead letter.” *Id.* at 374 (Gorsuch, J., dissenting).

D. *Amicus* agrees with Petitioner that this case

presents an ideal vehicle for the Court to address the predicate question left open in *Warner Chappell* and clarify that the Copyright Act embodies the standard rule, i.e., the incident of injury rule, and not a “discovery rule.” This is a “vital” and important question of law. Its application across the circuits is confused and inconsistent, and the reasoning for applying a “discovery rule” to copyright infringement claims has been rejected repeatedly by this Court. See, e.g., *Everly*, 958 F.3d at 459-68 (Murphy, J., concurring) (identifying and analyzing mistakes in circuit precedents that apply a discovery rule to copyright infringement claims). As Judge Murphy notes, its application appears to be no more than a “groove,” requiring this court to get the courts out of it. *Id.* at 468 (Murphy, J., concurring).

The Court has long recognized that “Congress legislates against the ‘standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.’” *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019) (quoting *Graham Couty Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997))). Further, if the statutory text can plausibly be interpreted as embodying the standard rule, then it does. *Ibid.* Similarly, Congress is presumed to draft limitations periods against the background principle that limitations periods are customarily subject to equitable tolling unless it would be inconsistent with the relevant statutory text. *Young v. United States*, 535 U.S. 43, 49-50 (2002) (characterizing this background principle as “hornbook law”).

This framework—copyright claims “accruing” under the standard/injury rule but subject to equitable

tolling—properly assigns litigants with evidentiary burdens within their control and promotes fairness in the law. When sued, a defendant must establish the “objective reality” of when the infringing act occurred. The burden then shifts to the plaintiff to come forward with evidence to establish a basis for equitable tolling. Only then does a defendant need to come forward with evidence peculiarly within a plaintiff’s control, i.e., when it actually knew of the alleged infringement or when it “should have” known. See *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 339-41 (CA5 1971).

Applying the standard rule for claim accrual, leaving open the possibility of a plaintiff establishing a basis for equitable tolling, is the only rule consistent with the statutory text, the presumptions we attribute to Congress, and this Court’s precedents for statutes of limitations. It also produces the fairest results. Most cases will survive a motion to dismiss. Only cases where the complaint forecloses a tolling argument, or it cannot be genuinely disputed that the act was public and not concealed, will be resolved at the Rule 12 stage. At summary judgment, the defendant must establish that the infringing act occurred more than three years before the suit was filed to shift the burden to the plaintiff to show that there is a triable issue with respect to tolling. At trial, if the defendant establishes that the infringing act occurred more than three years before suit, the plaintiff can only prevail if a basis for tolling is established to render the claim timely. This protects defendants from being haled into court for long dead claims, particularly where the allegedly infringing act was public and temporary, occurring only outside of the Act’s three-year limitation period.

The petition for a writ of certiorari should be granted to harmonize the Copyright Act’s statute of

limitations with this Court’s precedents and get lower courts out of the “groove” they are in with respect to the “discovery rule.”

ARGUMENT

A. Review by This Court is Necessary to Resolve the Conflicts and Confusion Arising From Lower Courts’ Application of §507(b) That Resulted in the So-Called “Discovery Rule.”

1. While the Second Circuit’s application of the so-called “discovery rule” is the same as the rule adopted in, at least, the Ninth Circuit, an actual conflict exists between circuits applying a copyright claim accrual “discovery rule” and the Third Circuit. Importantly, the Third Circuit is the only circuit to analyze the text of §507(b), the only circuit to have analyzed §507(b) in light of this Court’s precedents, and—not surprisingly—it is the only circuit to hold that copyright infringement claims “accrue” when an infringing act occurs, i.e., that §507(b) embodies the “injury rule.” *Graham II*, 646 F.3d at 150 (“We hold that the ‘accrual of a cause of action occurs at the moment at which each of its component elements has come into being as a matter of objective reality, such that an attorney with knowledge of all the facts could get past a motion to dismiss for failure to state a claim.’”).

However, to reconcile its prior holding in that very case, the Third Circuit held that the “discovery rule” “operates in applicable cases to toll the running of the limitations period.” *Id.* at 150-51; see also *id.* at 146 (characterizing the appellate argument as the “interplay between our prior holding in this case to the effect that, under the ‘discovery rule’ Graham’s cause of action did not ‘accrue’ for statute of limitations purposes until it discovered its injury, see [*Graham I*, 568 F.3d

at 433-41]” and Supreme Court precedent that pre-judgment interest begins when the claim “accrues”). Though correctly recognizing that the text of the Copyright Act cannot embody a “discovery rule” for claim accrual, the Third Circuit incorrectly holds that there exists a federal “discovery rule” that—in “applicable cases”—tolls the limitations period. *Id.* at 147-151. While it is not clear when a case is eligible for the application of this new tolling doctrine, that rule also misses the mark, introducing an alternate ground for rejecting Congress’s reasoned judgment in enacting a statute of limitations.

2. a. When tracing back the application of the “discovery rule,” it is evident that using it as a rule for copyright claim accrual results from the misapplication of the doctrine of equitable tolling. Most commonly, cases citing the “discovery rule” trace the origins back to the Second, Seventh, and Ninth Circuits. Each of those circuits, however, trace their precedent back to cases adopting the traditional rule of equitable tolling for fraudulent concealment of a copyright claim. That rule, applied incorrectly over the years, ultimately resulted in a “discovery rule” for delaying claim accrual, without any textual analysis or legal reasoning for adopting such a broad, atextual “discovery rule.”

b. The Second Circuit traces its precedent to *Stone v. Williams*, 970 F.2d 1043 (CA2 1992) and *Merchant v. Levy*, 92 F.3d 51 (CA2 1996). The issue addressed in *Stone* was whether the claims for a declaration of copyright ownership, brought under the Declaratory Judgment Act, 28 U.S.C. §2201(a), were timely. 970 F.2d at 1047-49. But because the existence of the plaintiff’s claim had been fraudulently concealed, the claim was equitably tolled until the plaintiff knew, or

should have known, of the claim’s existence. *Id.* at 1048-49. Thus, *Stone* held the opposite of a “discovery rule.” Rather than the claim *accruing* when the plaintiff knew or should have known of the claim, it “accrued” but was *tolled* due to fraudulent concealment until it was known or should have been known. *Ibid.* (citing *Prather*, 446 F.2d 341). In *Merchant*, the court cited *Stone* but held that the cause of action was barred by the limitations period, meaning that it did not need to pass on the question of whether the claim accrued based on “discovery” or “occurrence.” 92 F.3d at 56.

The Second Circuit did not revisit the copyright claim “accrual” until it decided *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120 (CA2 2014). But *Psihoyos*, once again, did not require the court to pass on the question of claim “accrual.” Citing *Stone* and *Merchant*, the *Psihoyos* court stated that it “has previously employed a discovery rule for copyright claims under 17 U.S.C. § 507(b),” and then unnecessarily concluded that a “discovery rule” applied based on the Third Circuit’s decision in *Graham I*, overlooking the subsequent analysis in *Graham II*. *Psihoyos*, 748 F.3d at 124-25. But that discussion was unnecessary to the holding because the 2011 lawsuit was filed within three years of the most recent infringing acts, *id.* at 122 (infringing acts occurred between 2005 and 2009), and the plaintiff sought relief in the form of *statutory* damages under §504(c)(2), *id.* at 126-27. The statutory damage analysis can consider a defendant’s past conduct—otherwise outside of the limitations period—in determining what relief is necessary to deter future infringement. *Ibid.*

c. The Seventh Circuit is also often credited as adopting a “discovery rule” for copyright claims, but a

more careful reading shows it has not done so for copyright infringement claims. In *Taylor v. Meirick*, 712 F.2d 1112 (CA7 1983), often cited as a basis for applying a “discovery rule,” see, e.g., *Warren Freedensfeld Assocs. v. McTigue*, 531 F.3d 38, 44 (CA1 2008), the issued addressed by the Seventh Circuit was equitable tolling based on fraudulent concealment. *Taylor*, 712 F.2d at 1117-18 (“In any event, there is no doubt that the copyright statute of limitations is tolled by ‘fraudulent concealment’ of the infringement.”) (citing *Prather*, 446 F.2d at 340-41, and *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573-74 (CA4 1976)). Moreover, acts of infringement occurred “well within three years of the bringing of th[e] suit,” and therefore were not barred by §507(b). *Id.* at 1119. The *Taylor* court also applied a “continuing wrong” doctrine, *ibid.* that this Court has since rejected, *Petrella*, 572 U.S. at 671 and n.6.

While the Seventh Circuit has since passed on the timeliness of claims for a declaration of copyright ownership, see, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 652-53 (CA7 2004); *Consumer Health Info. Corp. v. Amylin Pharms., Inc.*, 819 F.3d 992, 995-97 (CA7 2016); *Sumrall v. LeSEA, Inc.*, 104 F.4th 622, 627-28 (CA7 2024), it has not passed on the question of copyright infringement claim accrual, see *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 612 (CA7 2014) (“CBD’s complaint alleges potentially infringing acts that occurred within the three-year look-back period from the date of suit, so the case should not have been dismissed” at the pleadings stage).

d. The Ninth Circuit adopted a “discovery rule” for copyright claim accrual in *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.2d 700 (CA9 2004). That case addressed whether §507(b) “prohibit[ed] recovery of

damages incurred more than three years prior to the filing of suit,” where the “plaintiff was unaware of the infringement” at that time. *Id.* at 706. In holding that such recovery was possible, the court adopted a “discovery rule” for copyright infringement claim accrual, despite remanding the actual damages award to the district court to order a remission of the excess contained in the verdict. *Id.* at 707, 710.

The conclusion in *Polar Bear*, however, was reached without any analysis of the text of §507(b). See *id.* at 705-07. Instead, the *Polar Bear* court imported a “rule” from *Roley v. New World Pictures, Ltd.*, 19 F.3d 479 (CA9 1994), without discussion or consideration of the different postures between those cases. *Polar Bear*, 384 F.3d at 706 (citing *Roley*, 19 F.3d at 480-81); see also *Everly*, 958 F.3d at 461-62 (Murphy, J., concurring) (“In an oft-cited example, the Ninth Circuit adopted the discovery rule in an unreasoned sentence, relying on a district-court decision addressing the use of fraudulent concealment to toll a statute of limitations.”) (citing *Roley*, 19 F.3d at 481).

The decision in *Roley* did not hold that a “discovery rule” applied to copyright infringement claims. 19 F.3d at 481-82. In *Roley*, the Ninth Circuit rejected the “rolling statute of limitations’ theory” from *Taylor* and then held that the plaintiff’s claims were barred under §507(b) while specifically noting that “*Roley* fail[ed] to produce any evidence that appellees engaged in actionable *conduct* after February 7, 1988,” i.e., within three years of the lawsuit’s filing. *Ibid.* (emphasis added). Though unnecessary to its decision, the *Roley* court began with a statement in dicta that “[a] cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.” *Ibid.* (citing *Wood*

v. *Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980)); see also *Everly*, 958 F.3d at 461-62 (Murphy, J., concurring). The holding, however, focused on the timing of the defendant's *conduct*, i.e., the occurrence of the infringing act. *Roley*, 19 F.3d at 481-82.

The *Wood* decision, cited by *Roley*, did not adopt or employ a “discovery rule.” *Wood* held that copyright infringement claims accrue when an infringing act occurs. 507 F. Supp. at 1134-35 (“Thus, plaintiff may sue only for those alleged infringements occurring on or after January 2, 1976,” i.e., within three years of the action’s filing). *Wood* addressed (again) the argument of whether “the statute should be tolled because of an alleged fraudulent concealment of all of the infringements by all of the defendants,” where the plaintiff claimed “he had no basis until 1977 to reasonably suspect infringements of any photograph other than the one photograph which had been the subject matter of his initial suit in 1972.” *Id.* at 1135 (citing *Prather*, 446 F.2d at 340); see also *Everly*, 958 F.3d at 461-62 (Murphy, J., concurring). In *Wood*, the claim was barred because the plaintiff could not establish entitlement to equitable tolling based on fraudulent concealment of the cause of action. 507 F. Supp. at 1135.

3. Other confusion between the circuits has arisen due to conflating infringement claims arising under the Copyright Act with claims for a declaration of copyright ownership rights under the Declaratory Judgment Act. See, e.g., *Everly*, 958 F.3d at 463-68 (Murphy, J., concurring) (discussing problems arising from decisions addressing copyright “ownership” as a claim under the Copyright Act, rather than as an element of an infringement claim or as a claim under the Declaratory Judgment Act).

Disputes where the plaintiff seeks to establish ownership rights in a copyrighted work have been commonly referred to as “copyright ownership” “claims.” See, *e.g.*, *Webster v. Dean Guitars*, 955 F.3d 1270, 1275-76 (CA11 2020) (collecting cases seeking declarations of ownership); *Everly*, 958 F.3d at 463-68 (Murphy, J., concurring) (discussing problem associated with copyright ownership “claims”). “Ownership” is not a “claim” under the Copyright Act. “Ownership” is an *element* of a copyright infringement claim. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also Everly*, 958 F.3d at 463-68 (Murphy, J., concurring). A claim seeking a declaration of “ownership” (or co-ownership) rights in a copyrighted work is a “claim” under the Declaratory Judgment Act. See, *e.g.*, *Stone*, 970 F.2d at 1047-48; *Webster*, 955 F.3d at 1275-76; *Everly*, 958 F.3d at 463-68 (Murphy, J., concurring).

Courts addressing claims for a declaration of copyright ownership rights have looked to §507(b) for a limitations period. See, *e.g.*, *Stone*, 970 F.2d at 1048 (“Because a declaratory judgment action is a procedural device used to vindicate substantive rights, it is time-barred only if relief on a direct claim based on such rights would also be barred.”). Further, courts have looked to §507(b) when addressing infringement claims where the gravamen of the claim is a dispute as to who owns the copyrighted work. See, *e.g.*, *Webster*, 955 F.3d at 1277 (“when a copyright ownership claim is time-barred, ‘all those claims logically following therefrom should be barred including infringement claims.’”) (quoting *Calhoun v. Lillenas Publ’g*, 298 F.3d 1228, 1236 (CA11 2002) (Birch, J., concurring)); *Stone*, 970 F.2d at 1047-48; *Webster*, 955 F.3d at 1275-76. But those are not copyright “claims.”

While Congress included a statute of limitations for “claims” under the Copyright Act, it did not do so for claims maintained under the provisions of the Declaratory Judgement Act. Cf. 17 U.S.C. §507(b).

4. a. Under this Court’s precedents, §507(b) embodies the “standard rule,” also known as the “incident of the injury” rule, where an infringement claim “accrues” each time an act of infringement occurs. See, e.g., *Rotkiske*, 589 U.S. at 13; *Warner Chappell*, 601 U.S. at 374-75 (Gorsuch, J., dissenting) (collecting cases). But this Court has also explained that “[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute,” and that “Congress must be presumed to draft limitations periods in light of this background principle.” *Young*, 535 U.S. at 49-50.

The plain text of §507(b) indicates that copyright infringement claims “accrue” under the standard rule, i.e., the “incident of the injury rule” (or “injury rule”). See *Rotkiske*, 589 U.S. at 13-15; *Warner Chappell*, 601 U.S. at 374-75 (Gorsuch, J., dissenting). As Petitioner correctly asserts, §507(b) is properly interpreted as adopting the occurrence rule rather than an atextual discovery rule. Pet. 10-14.

This Court’s precedents reflect that applying a broad, atextual discovery rule to alter the meaning of the verb “accrue”—but only for copyright cases—is error. See, e.g., *Gabelli*, 568 U.S. at 448-49; *Rotkiske*, 589 U.S. at 13-15; *Petrella*, 572 U.S. at 670-71 (not passing on the question but articulating these long-standing principles); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 337-38 (2017) (explaining the interpretation of statutes of limitations generally).

b. Application of the “standard rule,” i.e., that infringement claims accrue each time an infringing act occurs, is not an inflexible bar. That “standard rule” leaves room for equity, and also is the only rule that assigns the burdens of production and persuasion in a fair and balanced manner. Limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the statutory text, and Congress is presumed to draft such provisions against that background principle. *Young*, 535 U.S. at 49-50.

For copyright infringement claims, a defendant bears the burden of establishing that the alleged infringing act *occurred* more than three years prior to the complaint’s filing, which then shifts the burden to the plaintiff to establish a basis for equitable tolling. *Prather*, 446 F.2d at 339-41. This rule is most consistent with the text of the statute and this Court’s precedents, and it produces the fairest results.

Under the “standard rule,” most cases will survive a motion to dismiss unless tolling is foreclosed by the pleadings or the public nature of the alleged infringement. At summary judgment or trial, the defendant must establish the date of the infringing act or acts, something that is within the defendant’s ability to prove. If infringement occurred more than three years before suit, the burden shifts to the plaintiff to provide a basis for tolling (or a triable issue to survive summary judgment). For example, to establish tolling based on fraudulent concealment, a plaintiff must show the defendant took an affirmative act to conceal the infringement. See, e.g., *Taylor*, 712 F.2d at 1118 (“The term ‘fraudulent concealment’ implies active misconduct”); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that

he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”).

If a basis for equitable tolling exists, the burden shifts back to the defendant to establish when the tolling period ended, i.e., when the plaintiff knew or should have known of the claim. See, e.g., *Prather*, 446 F.2d at 339-41; *Credit Suisse Sec. (USA) LLC v. Simmons*, 566 U.S. 221, 227 (2012) (“It is well established * * * that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those are, or should have been, discovered by the plaintiff.”).

But under the “discovery rule” applied in most lower courts, defendants are required in the first instance to prove what a plaintiff knew or should have known, putting defendants to the near-impossible burden of proving the mind of *the plaintiff*, a negative fact peculiarly within the control of the plaintiff. Cf. *Allstate Fin. Corp. v. Zimmerman*, 330 F.2d 740, 744-45 and n.5 (CA5 1964) (collecting cases and explaining, “[w]here the burden of proof of a negative fact normally rests on one party, but the other party has peculiar knowledge or control of evidence as to such matter, the burden rests on the latter to produce such evidence, and failing, the negative will be presumed to have been established.”). The “discovery rule” improperly requires defendants to prove a negative fact, i.e., the plaintiff’s knowledge, where the plaintiff is the only source of evidence on that fact. That places an unfair and inequitable burden on defendants, and effectively eliminates the Act’s statute of limitations altogether.

B. The Court Should Grant Certiorari to Resolve the Question Presented and Hold That Copyright Infringement Claims “Accrue” Based on the Occurrence of the Infringing Act, But That General Equitable Principles Can Apply to Toll the Limitations Period.

1. Properly interpreting the statute of limitations for copyright infringement claims is “vital,” more so than most statutes of limitations, due to the growing trend of copyright “trolling.” See, e.g., *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (CA7 2017) (explaining the unsavory rise of intellectual property “trolling”); M. Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1107-11, 1113-14 (2015) (discussing and describing copyright “trolling”). Such cases are characterized by copyright holders bringing “strategic infringement claims of dubious merit in the hope of arranging prompt settlements with defendants who prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation.” *Design Basics*, 858 F.3d at 1097; accord *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 792 (CA7 2014) (“The [troll’s] business strategy is plain: charge a modest license fee for which there is no legal basis, in the hope that the ‘rational’ writer or publisher asked for the fee will pay it rather than incur a greater cost, in legal expenses, in challenging the legality of the demand.”); *Live Face on Web, LLC v. Cremation Soc’y of Ill., Inc.*, 77 F.4th 630, 634 (CA7 2023) (same).

That growing trend of copyright “trolling” is often associated with allegations of Internet-based infringement, where a defendant’s acts from years (or decades) earlier is often archived and capable of being searched years after the act occurred. See, e.g., *Design Basics*,

858 F.3d at 1096-98; I. Polonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 Colum. J.L. & Arts 71, 78-80 (2012). As such, parties who may have inadvertently used a copyrighted image or other work is subject to being haled into court years after the fact, where memories have faded, and evidence of possible licensing or other defenses have been lost due to the passage of time. See, e.g., *Gabelli* 568 U.S. at 448-49 (citing *Wood*, 101 U.S. at 139; and *Wilson*, 471 U.S. at 271).

2. Permitting a “discovery rule” encourages unnecessary litigation. It encourages the filing of claims long after the three-year limitations period has expired. It encourages parties to search the Internet Archive’s WayBack Machine for evidence of an infringing act from years (or decades) earlier.

This causes the most harm to individual defendants and small companies that don’t have significant funds to fight over a claim from years prior. For exactly that reason, these are the type of defendants regularly targeted for these types of claims. They are easy prey; they are most likely to pay a nuisance settlement to quickly resolve the action. Avoiding litigation over stale, and dubious, claims is exactly why Congress passes statutes of limitations and why this Court deems them “vital” to the welfare of society. See, e.g., *Wood*, 101 U.S. at 139; *Wilson*, 471 U.S. at 271; *Gabelli* 568 U.S. at 448-49. Those goals are defeated by permitting a “discovery rule.” The “discovery rule” judicially eliminates that which Congress intentionally added to the Copyright Act.

* * *

The question presented in the petition is “vital” to copyright litigation. The judges who have analyzed the statutory text of §507(b) have rightly concluded

that it embodies the “standard rule,” i.e., the “incident of injury rule,” yet many circuits—and nearly all district courts—hold that infringement claims “accrue” based on an atextual “discovery rule.” Only this Court can harmonize the law by properly interpreting §507(b), and remove those courts from the “groove” they have found themselves in.

In so doing, the Court should hold, as three Justices discussed last term, that the Copyright Act “does not tolerate a discovery rule.” *Warner Chappell*, 601 U.S. at 374 (Gorsuch, J., dissenting). If it is plausible based on the text—and §507(b) is—Congress is presumed to have adopted an occurrence rule when creating a statute of limitations. *Rotkiske*, 589 U.S. at 13-14. Congress is also presumed to draft limitations periods in light of the basic principle that equitable tolling applies unless inconsistent with the text. *Young*, 525 U.S. at 49-50. Applying these principles, copyright claims “accrue” when the infringing act occurs, but they are subject to general principles of equitable tolling, such as for fraudulent concealment, which can toll the limitations period, but only after *the plaintiff* establishes a basis for tolling. *Pace*, 544 U.S. at 418.

The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should grant the petition for a writ of certiorari and resolve the question presented by holding that copyright infringement claims “accrue” under §507(b) based on the occurrence of the alleged infringing act, and that it is the plaintiff’s burden to establish entitlement to equitable tolling doctrines

before one can be applied.

Respectfully submitted,

/s/

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