No. 24-768

IN THE

Supreme Court of the United States

RADESIGN, INC., *et al.*,

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 *AMICI CURIAE* THE AMERICAN APPAREL & FOOTWEAR ASSOCIATION, THE COUNCIL OF FASHION DESIGNERS OF AMERICA, INC., AND THE ACCESSORIES COUNCIL IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici and their members share an interest in predictability and certainty in copyright protection and litigation under the Copyright Act. As brands, producers, and retailers who both assert and defend against copyright claims, Amici write to share their perspective on the unpredictability and uncertainty that plagues copyright litigation across the country.

The American Apparel & Footwear Association is a national trade association representing more than 1,100 name-brand apparel, footwear, travel goods, and other sewn product companies, and their suppliers. Through its public policy and political initiatives, AAFA protects American brands, their products, and their intellectual property, and provides guidance to its members on litigation-related issues affecting their work.

The Council of Fashion Designers of America, Inc., is a trade association with a membership of over 450 of America's foremost womenswear, menswear, jewelry, and accessory designers. The CFDA provides its members with thought-leadership and business development support. It also supports emerging designers and students through professional development programming and numerous grant and scholarship opportunities. Through the CFDA Foundation, Inc., CFDA also mobilizes its membership

1. Pursuant to Rule 37.2, the parties have been notified of the intent to file this amicus brief and do not object. No counsel for any party has authored this brief in whole or in part, and no person other than the *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief.

to raise funds for charitable causes and engage in civic initiatives.

The Accessories Council is a trade association dedicated to helping accessories, jewelry, and footwear companies grow their businesses. The membership includes over 350 members, from large companies to start-ups. The Council hosts over 100 opportunities for its members each year—including awards, events, educational programming, legislative support, mentoring, press support, and sourcing assistance—and publishes a weekly newsletter and a quarterly digital magazine. Many of its members have small budgets and limited resources for protecting their designs from copies.

SUMMARY OF ARGUMENT

Predictability in the law is a must. Whether it be the substantive law governing human affairs or the procedural law that governs legal disputes as they arise, predictable rules help order society and allow economic growth. Statutes of limitations are at the top of this list, governing the timing of disputes and allowing would-be litigants to assess risk and govern their affairs accordingly.

Despite Congress delivering predictability in the Copyright Act, courts across the country have undermined it by injecting a discovery rule into copyright litigation. This case presents an opportune time for this Court to restore predictability as Congress intended.

ARGUMENT

1. The Amici Need Predictability in Copyright Litigation.

An "organized and cohesive society" requires the "erection and enforcement of a system of rules" that enable citizens to govern their affairs and definitively settle their differences in an orderly, predictable manner." *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). "[R]egularized resolution of conflicts"—or, what Justice Harlan called the "injection of the rule of law"—makes possible the sort of "interdependent action that enables [citizens] to strive for achievements without the anxieties that would beset them in a disorganized society." *Id.*

Few rules are as vital to this "regularized, orderly process of dispute settlement," *see id.*, than those governing statutes of limitations. "Statutes of limitation are vital to the welfare of society" by "giving security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). By conclusively barring litigation, statutes of limitation account for the basic reality that "time is constantly destroying the evidence of rights." *Id.* In "their conclusive effects," statutes of limitation "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944). With time, "the right to be free of stale claims" prevails "over the right to prosecute them." *Id.*

One of the "basic policies" of limitations periods is "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Knowing the end date of potential exposure to litigation enforcement is critical to achieve the goals of limitations periods. *See Gabelli v. S.E.C.*, 568 U.S. 442, 448–49 (2013). "[E]ven wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

These principles are particularly important to copyright law. "Copyright law strikes a practical balance between the intellectual-property rights of authors and the public interest in preserving the free flow of ideas and information and encouraging creative expression, all in furtherance of the constitutional purpose to 'promote the Progress of Science and useful Arts.'" *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 882 (7th Cir. 2021) (quoting U.S. Const. art. 1, § 8). From the artists who design, to the manufacturers who produce, to the retailers who sell—everyone in the economic chain of product creation and distribution relies on predictable rules to develop, innovate, and grow. These rules fuel the rise not just of industry, but of the American economy writ large.

Unfortunately, and as the Petitioner makes clear, this predictability is missing in copyright litigation. The Copyright Act states that a claim under the Act must be "commenced within three years after the claim accrued." 17 U.S.C. § 507(b). This provision was specifically meant to provide uniformity and predictability in place of the disjointed time periods limiting copyright actions in the states. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) ("The federal limitations prescription

governing copyright suits serves two purposes: (1) to render uniform and certain the time within which copyright claims could be pursued; and (2) to prevent the forum shopping invited by disparate state limitations periods, which ranged from one to eight years."); S. Rep. No. 85-1014, at 2 (1957), *reprinted at* 1957 U.S.C.C.A.N. 1961-62. Time and again, Congress has amended the Copyright Act to "enhance[e] predictability and certainty of copyright ownership." *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (discussing 1976 amendments).

Predictability should have followed. After all, "[a] claim ordinarily accrues when a plaintiff has a complete and present cause of action" allowing them to "file suit and obtain relief." *Petrella* at 671 (cleaned up). In other words, "when an infringing act occurs." *Id.* But through a hodgepodge of reasons—some worse than others—courts across the country opted instead for holding that a claim accrues when it is discovered. As articulated by the Second Circuit here, "an infringement claim does not accrue until the copyright holder discovers, or with due diligence should have discovered, the infringement." *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 150 (2nd Cir. 2024) (cleaned up).[2]

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2. Depending on the court, though, the precise parameters of this rule vary. *See Starz Ent., LLC v. MGM Domestic TV Distrib., LLC*, 39 F.4th 1236, 1238 (9th Cir. 2022) (finding no "smoke" to put Starz on notice that its copyrights were being infringed despite MGM licensing over 300 movies and television shows to third-party streaming services in violation of the licensing agreement); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796 (4th Cir. 2001) ("a claim accrues when one has knowledge of a violation or is chargeable with such knowledge") (cleaned up).

Aside from being atextual, this discovery rule is plagued with unpredictability. This case is a textbook example of that. Ruthie Davis designed a pair of shoes which, in 2017, Michael Grecco photographed on a model. Those photos were published in a magazine and, months later, Ruthie Davis republished the photographs that showcased her shoes. Over four years later, Grecco sued, claiming that he had discovered Davis' allegedly infringing activity—public posts on her website and Twitter—only in February 2021. While Grecco waited four years, nothing in the law stops him—or those like him—from sticking his head even further in the sand and suing even later based on his allegedly delayed discovery.

Predictably, this unpredictability hampers the Amici and their members. In the fashion, footwear, apparel, and accessories industries, brands are constantly creating new products and retailers are selling them. From their creation to their launch, these products rely on innovation and novelty. Product announcement and marketing often includes music in the commercial domain and the use of the internet and social media to reach consumers. While reasonable copyright issues may arise, they gradually become unreasonable with interminable and varied limitations periods.

The cost of innovation and reaching consumers is too often found in defending claims many years after products have been placed in circulation. So, for example, a product announcement on social media can, many years later, be the subject of a copyright claim. The growth of social media and its use in marketing products exacerbates this risk. Unsurprisingly, then, baseless lawsuits asserting vague or generic copyrights for the sole purpose of monetary

gain proliferate in a world where a litigant controls the supposed discovery of their claim. *See generally* Copyright Trolling, An Empirical Study, 100 Iowa L. Rev. 1105, 1108-09 (2015) (assessing the scope of copyright trolling litigation).

Business strategy and risk assessment require more certitude than this. Indeed, some of Amici's members face insurance coverage problems because insurance companies have assessed the risk exposure as too high when statutory liability exists for claims unlimited by the passage of time. *See generally Doran v. Compton*, 645 F.2d 440, 450 (5th Cir. 1981) (noting how certainty regarding limitations periods "allows an insurance company to predict more accurately the potential losses for a policy year" and set rates accordingly). Delayed risk in the form of a discovery rule for copyright claims undermines innovation and confidence and threatens the growth and economic strength of these industries.

2. Congress Created a Predictable Accrual Rule; This Court Should Enforce it.

Rules that "inject uncertainty and unpredictability into copyright ownership" run counter to Congress' goals for the Copyright Act. *Davis v. Blige*, 505 F.3d 90, 105 (2d Cir. 2007). The plain language of the Copyright Act and this Court's jurisprudence on accrual demands correcting the error of the Second Circuit in this case and those of the other circuits in applying a discovery rule to Copyright Act claims.

A claim under the Copyright Act accrues when the infringement occurs. *Petrella*, 571 U.S. at 670. It is at that

point—not the later discovery of the infringement—that a plaintiff "has a complete and present cause of action." *Id.* (internal quote omitted). And with each infringement, the accrual period runs anew:

> [T]he separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation. 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. In short, each infringing act starts a new limitations period.

Petrella, 572 U.S. at 671.

Aside from being the only accrual rule that is faithful to the Copyright Act, the injury rule is both predictable and workable in practice. From content moderation algorithms to artificial intelligence, tools abound for copyright owners to detect infringements and file claims within three years of that infringement. Plus, as Congress noted in passing the three-year limitations period, "due to the nature of publication of works of art[,] generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights." *See* S.Rep. No. 85–1014, at 2, *reprinted in* 1957 U.S.C.C.A.N. at 1962. And with the benefit of the separate-accrual rule, rights holders remain protected for continued infringements when an initial reproduction or distribution goes unnoticed. So, for example, each time a publication or website listing of a copyrighted work occurs, a new three-year limitations

period begins for that infringement and a copyright owner can recover damages for that period.

Simply put, the injury rule has the benefit of not just being faithful to the Copyright Act and Congress' intent, but also of being workable for all parties in copyright litigation. This Court should end the discovery rule and restore predictability to the law.

CONCLUSION

For these reasons, and those articulated by the Petitioner and other Amici, this Court should grant the Petition and clarify once and for all that the injury rule applies to Copyright Act claims.

Respectfully submitted,

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