

# **APPENDIX**

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 21-13232

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SHERMAN NEALY, an individual;  
MUSIC SPECIALIST, INC., a Florida Corporation,  
Plaintiffs-Appellants

v.

WARNER CHAPPELL MUSIC, INC.,  
a Delaware Corporation;  
ARTIST PUBLISHING GROUP, L.L.C.,  
a Delaware Limited Liability Corporation,  
Defendants-Appellees

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Filed: February 27, 2023

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Before: WILSON, JORDAN, and BRASHER, Circuit  
Judges.

**OPINION**

BRASHER, Circuit Judge.

This appeal requires us to answer a question of first impression about the Copyright Act's statute of limitations that has divided our sister circuits. The Copyright

Act has a three-year statute of limitations. 17 U.S.C. § 507(b). Under our circuit’s discovery accrual rule, claims about the ownership of a copyright are timely if a plaintiff files suit within three years of when the plaintiff knew or reasonably should have known that the defendant violated the plaintiff’s ownership rights. Invoking that discovery rule, the plaintiffs in this case—Sherman Nealy and Music Specialist, Inc.—filed this copyright action seeking, among other things, damages for infringement they allege occurred more than three years before they filed this lawsuit.

Despite our discovery rule, the defendants—Warner Chappell Music, Inc. and Artist Publishing Group, LLC—contend that the plaintiffs cannot recover damages for anything that happened more than three years before they filed suit. *See Sohm v. Scholastic, Inc.*, 959 F.3d 39, 49-50 (2d Cir. 2020) (accepting this argument). That is, they do not dispute that a plaintiff can file suit over harm that occurred more than three years earlier; they just say that the plaintiff cannot recover any damages. This is so, they say, because the Supreme Court’s decision in *Petrella v. Metro-Goldwyn-Mayer*, 572 U.S. 663 (2014), bars retrospective relief for any infringement occurring earlier than three years from the date of a copyright lawsuit. In response, the plaintiffs contend that the defendants’ argument is contrary to the text of the Copyright Act and takes out of context *Petrella*’s statements about claims that were timely because of a different accrual rule. *See Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1242-44 (9th Cir. 2022) (accepting this argument).

The district court certified the following question for interlocutory appellate review: whether damages in this copyright action are limited to a three-year lookback

period as calculated from the date of the filing of the complaint. After briefing and with the benefit of oral argument, we agree with the plaintiffs. We hold that, when a copyright plaintiff has a timely claim under the discovery accrual rule for infringement that occurred more than three years before the lawsuit was filed, the plaintiff may recover damages for that infringement.

### I.

This interlocutory appeal arises from Music Specialist, Inc. and Sherman Nealy's copyright infringement suit against Warner Chappell Music, Inc.; Artist Publishing Group, LLC.; and Atlantic Recording Corporation. Because we must decide a pure question of law in this interlocutory appeal, we provide the following background only as context for our decision. To be clear, "our description of the facts is not binding on the district court as the actual facts will be established later at trial." *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1511 n.2 (11th Cir. 1994).

At its core, MSI and Nealy's suit alleges that Warner, Artist, and Atlantic are infringing their copyrights to certain musical works because the defendants are using the works based on invalid licenses to the copyrights that they obtained from third parties. The licenses are invalid, MSI and Nealy say, because MSI and Nealy, not the third-party licensors, are the owners of the copyrights.

The story of MSI and Nealy's alleged copyright ownership begins in the 1980s. In 1983, MSI was incorporated under Florida law with Tony Butler listed as president in the articles of incorporation. Later amendments to the articles of incorporation listed Nealy as MSI's president and Butler as its vice president. MSI was Nealy's first venture in the music industry. He provided the funding for MSI's

operation, and Butler was a disc jockey who had more knowledge than Nealy about the music industry. Butler authored or co-authored all the musical works at issue in this case.

From 1983 to 1986, MSI recorded and released one album and several singles on vinyl and cassette. Those singles include all the works involved in this case, each of which is registered with the United States Copyright Office. Then, in 1986, MSI dissolved as a corporation and remained an inactive corporation until its reinstatement in 2017 with Nealy as owner, president, and shareholder. Although it dissolved in 1986, MSI's business did not cease until 1989 when Nealy began serving a prison sentence following a conviction for distributing cocaine. Nealy was released in 2008.

While Nealy was in prison, Butler formed another company named 321 Music, LLC and began licensing the rights to musical works from the MSI catalog. In February 2008, Atlantic obtained a license from Butler and 321 to interpolate "Jam the Box," one of the works at issue in this case, into the artist Flo Rida's hit song "In the Ayer." Then, in July of that same year, Artist and Warner entered into an agreement with Butler and 321 that purportedly made Artist and Warner the exclusive administrators of the music publishing rights to all the musical works at issue in this case. Nealy did not authorize anyone to exploit the rights to the MSI catalog while he was in prison. And Nealy did not continue his involvement in the music industry or with MSI while in prison.

After Nealy left prison, he learned that another third party, Robert Crane, was distributing works from the MSI catalog. MSI and Nealy's legal consultant Jonathan Black met briefly with Crane and his lawyers in June 2008 to discuss Crane's use of the MSI catalog. But nothing

came of that meeting. Nealy recalled “letting them know that [he] was home [from prison] and that they had [his] music.” But he also “didn’t know what to do.” And so, he took no further action before returning to prison in 2012 to serve another sentence, which he completed in the fall of 2015.

Before Nealy returned to prison, litigation over the rights to the works ensued between Crane’s companies, Atlantic, Artist, Warner, Butler, and 321. But Nealy was not a party to this litigation and contends he did not learn of it until after serving his second prison sentence. Once he returned to prison, Nealy again did not have any involvement in the music industry.

Nealy alleges that he did not know and should not have reasonably known about the defendants’ violations of his ownership rights until sometime around the beginning of 2016. After Nealy finished serving his second sentence, a former MSI associate told Nealy about the litigation and Butler’s purported transfers of the rights to the musical works in January 2016. And then nearly three years later, on December 28, 2018, MSI and Nealy finally filed this lawsuit.

MSI and Nealy alleged that Atlantic, Artist, and Warner infringed their copyrights to several music works in violation of 17 U.S.C. § 501. MSI and Nealy sought relief for infringement they alleged occurred as early as 2008—ten years before they filed this lawsuit. The parties entered a joint-pretrial stipulation in which they agreed “that this case presents an ‘ownership dispute’ within the meaning of the statute of limitations for copyright claims.” After discovery, the defendants moved for summary judgment on all claims, which the district court granted in part and denied in part.

One issue the district court addressed at summary judgment was the timeliness of MSI and Nealy's claims. A three-year statute of limitations governs claims under the Copyright Act, which runs from the time the claim accrues. 17 U.S.C. § 507(b). Because the parties agreed that the only disputed substantive issue relating to MSI and Nealy's claims was whether MSI and Nealy owned the copyrights, the district court ruled that their claims accrued "when [MSI and Nealy] knew or should have known that [the defendants] were challenging their ownership to the [works]." Determining that a genuine dispute of material fact existed about when accrual occurred, the district court denied summary judgment for the defendants on statute of limitations grounds.

In a separate order, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether "damages in this copyright action are limited to the three-year lookback period as calculated from the date of the filing of the Complaint pursuant to the Copyright Act and *Petrella*." MSI and Nealy timely filed a petition to appeal from the certified order, which we granted, resulting in this interlocutory appeal.

Nealy and MSI also attempted to appeal from the district court's partial final judgment in favor of Atlantic, but we dismissed that appeal for lack of jurisdiction. We also exercised our discretion under Section 1292(b) to limit the issues in this appeal to the district court's certified question. It is to that question that we now turn.

## II.

We review legal questions, including the interpretation of federal statutes such as the Copyright Act and its statute of limitations, *de novo*. *See Stansell v. Revolution-*



ary *Armed Forces of Colom.*, 704 F.3d 910, 914 (11th Cir. 2013).

### III.

The Copyright Act’s statute of limitations provides that “[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). Under our precedent, where the “gravamen” of a copyright claim is ownership, the discovery rule dictates when a copyright plaintiff’s claim accrues. *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020). Under the discovery rule, a copyright ownership claim accrues, and therefore the limitations period starts, “when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights.” *Id.*

The question in this appeal is whether the Copyright Act’s statute of limitations, 17 U.S.C. § 507(b), precludes a copyright plaintiff from recovering damages for harms occurring more than three years before the plaintiff filed suit, even if the plaintiff’s suit is timely under our discovery rule. Our discussion proceeds in two parts. First, we briefly confirm that the discovery rule governs the timeliness of MSI and Nealy’s claims. Second, assuming MSI and Nealy’s claims are timely, we evaluate the Copyright Act and the Supreme Court’s decision in *Petrella* to determine whether the plaintiffs may recover damages for infringement that occurred more than three years before they filed this lawsuit.

#### A.

We start with the timeliness of the plaintiffs’ claims. The copyright statute of limitations runs from the day that a claim “accrues.” And there are two recognized rules for determining that date: the discovery rule and the

injury rule. Under the discovery rule, a claim “accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his” rights. *Webster*, 955 F.3d at 1276. These kinds of claims can only accrue one time. *Id.* Conversely, under the injury rule, a copyright plaintiff’s claim accrues when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it. *Petrella*, 572 U.S. at 670. But, attendant to the injury rule is the separate-accrual rule, which means that a new copyright claim accrues with each discrete infringement. *Id.* at 671-72.

Under our precedent, where the “gravamen” of a copyright claim is ownership, a plaintiff’s claim accrues when he knew or should have known about the infringement. *Webster*, 955 F.3d at 1276. The gravamen of a copyright claim is ownership if ownership of the copyright is the only disputed issue. *Id.* For example, in *Webster*, the defendant conceded that it used a copyright without the plaintiff’s permission. *Id.* But the defendant argued that it had a license from a third party who owned the copyright instead of the plaintiff. *Id.* Accordingly, the plaintiff’s claim was an ownership claim because the only disputed issue was whether the plaintiff or the third party owned the copyright. *Id.* And so, the discovery rule governed the timeliness of the plaintiff’s claim. *Id.*

We have little difficulty concluding that the discovery rule governs the timeliness of MSI and Nealy’s claims in this case. The parties entered a joint-pretrial stipulation in which they agreed “that this case presents an ‘ownership dispute’ within the meaning of the statute of limitations for copyright claims.” And the dispute in this case is materially indistinguishable from *Webster* for this purpose. The defendants concede that if MSI and Nealy prove that they own the copyrights to the works, the only

remaining issue in the case would be damages because the defendants' use of the works would have infringed MSI and Nealy's copyrights. The defendants also contend, like the *Webster* defendant, that they are not liable because a third party owns the copyrights and licensed them to the defendants. Accordingly, *Webster* controls, and the discovery rule governs the timeliness of MSI and Nealy's claims.

The district court applied the discovery rule and concluded that there was a genuine issue of fact about when the plaintiffs knew or should have known about their claims. We will assume for the purposes of answering the district court's certified question that the district court's summary judgment ruling on this point was correct. And so, assuming the plaintiffs' claims are timely under the discovery rule, we turn to the question whether the plaintiffs may recover retrospective relief for infringement that occurred more than three years before they filed this lawsuit.

## B.

The defendants rely on the Supreme Court's decision in *Petrella* to support their contention that MSI and Nealy may not recover for infringement that occurred more than three years before they filed this suit. In *Petrella*, the Supreme Court held that the equitable doctrine of laches does not bar copyright claims that are timely within the three-year limitations period because Section 507(b) "itself takes account of delay." *Petrella*, 572 U.S. at 670-72, 677. The Court identified several reasons that it was unnecessary to apply the doctrine of laches to copyright claims. One of those reasons, the Court said, was that "Section 507(b) . . . bars relief of any kind for conduct occurring prior to the three-year limitations period." *Id.* at 667. The Court explained that, by dint of the statute of

limitations, retrospective relief is available to a copyright plaintiff “running only three years back from the date the complaint was filed.” *Id.* at 672.

The circuits are split on the meaning of *Petrella*. The Second Circuit has held that, even under the discovery rule, a copyright plaintiff may not recover for infringement occurring more than three years before the plaintiff filed suit. *Sohm*, 959 F.3d at 49-50. The Second Circuit recognized that its ruling undermines the discovery rule: a copyright plaintiff could have a timely claim under the discovery rule but no available relief. But it felt itself bound by the Court’s statements in *Petrella*. More recently, the Ninth Circuit split with the Second Circuit and held that *Petrella* does not mean that a plaintiff cannot recover for infringement that occurred more than three years before the filing of an otherwise timely suit under the discovery rule. *Starz Ent.*, 39 F.4th at 1242-44. The court reasoned that an absolute three-year bar on damages “would eviscerate the discovery rule.” *Id.* at 1244. And the court explained that reading *Petrella* to impose such a rule would mean that the *Petrella* Court ignored the plain text of Section 507(b), which “limits civil actions to ‘three years after the claim accrued’” and says nothing about remedies. *Id.* at 1245 (quoting 17 U.S.C. § 507(b)).

We agree with the Ninth Circuit and hold that a copyright plaintiff may recover retrospective relief for infringement occurring more than three years before the lawsuit’s filing so long as the plaintiff’s claim is timely under the discovery rule. This is so for two reasons, which we discuss in turn. First, we believe *Petrella*’s statements about the availability of relief are directed to the way the statute of limitations works when claims accrue under the injury rule, not the discovery rule. Second, the text of the

Copyright Act does not place a time limit on remedies for an otherwise timely claim.

1.

The defendants' argument begins and ends with *Petrella*. Specifically, the defendants invoke the following quotes. The Supreme Court said that "Section 507(b) . . . bars relief of any kind for conduct occurring prior to the three-year limitations period." 572 U.S. at 667. And the Court said that the import of the statute of limitations is that a copyright plaintiff can get damages "running only three years back from the date the complaint was filed." *Id.* at 672. Because the statute of limitations already protects defendants from stale claims, the Court held that it was unnecessary to apply the equitable doctrine of laches.

We do not read these snippets from *Petrella* to create a three-year lookback period or a damages cap. We cannot read a court's opinion like we would read words in a statute. *CBS, Inc. v. FCC*, 453 U.S. 367, 385 (1981) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)); *United States v. Garges*, 46 F.4th 682, 685 (8th Cir. 2022); *Romo v. Largen*, 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring). 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 Reiter*, 442 U.S. at 341 (examining the language of a judicial opinion "in context"). Reading these statements in context, we are confident that the Court did not cap copyright damages for claims that are timely under the discovery rule.

For starters, *Petrella* did not present the question whether a plaintiff could recover for harm that occurred more than three years before the plaintiff filed suit if his claim was otherwise timely under the discovery rule. 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.” *Petrella*, 572 U.S. at 667. The plaintiff in *Petrella* “sought no relief for conduct occurring outside § 507(b)’s three-year limitations period.” 572 U.S. at 668. But the defendant nevertheless argued that laches barred the plaintiff’s claim because it was unreasonable and prejudicial to the defendant to allow the plaintiff to sue eighteen years after the defendant allegedly began infringing the plaintiff’s copyright. *Id.* at 674-75. The Court rejected the defendant’s argument and held that laches could not bar a copyright claim that was otherwise timely under the statute of limitations. *Id.* at 667.

In passing on the question presented, the Court reasoned that the defense of laches was unnecessary because the statute of limitations already protects putative defendants from stale claims. But the Court made its statements in the context of a claim that was timely *because of the injury rule*. And, as we have already explained, the plaintiffs’ claims in this case are timely because of the discovery rule, not the injury rule. This distinction is important for two reasons.

First, the Court’s statements in *Petrella* merely describe the operation of the injury rule on the facts of that case and others like it. The Court in *Petrella* explained that, under the injury rule, separate claims accrue with each new injury. *Id.* at 670-72. The injury rule and separate-accrual rule mean, as the Court said, that a separate copyright claim accrues “[e]ach time an infringing work is reproduced or distributed.” *Id.* at 671. Because the claim accrues “at the time the wrong occurs,” the statute of limitations protects putative defendants from stale claims by

giving a copyright owner only three years from that date to sue for the infringement. *Id.*; see 17 U.S.C. § 507(b). But after those three years pass, the owner no longer has a timely claim to sue for that act of infringement under the injury rule. That’s the way the injury accrual rule works—it precludes a plaintiff’s recovery for any harms that occur earlier than three years before the plaintiff files suit.

The discovery rule affords defendants a different kind of protection from stale claims. Under the discovery rule, it is possible to have a timely claim for an infringement that occurred more than three years before the lawsuit was filed. On the other hand, it also means that a claim accrues only one time: “when a copyright ownership claim is time-barred, ‘all those claims logically following therefrom should be barred, including infringement claims.’” *Webster*, 955 F.3d at 1277 (quoting *Calhoun v. Lillenas Publ’g*, 298 F.3d 1228, 1236 (11th Cir. 2002) (Birch, J., concurring)). Had the discovery rule applied in *Petrella*, the plaintiff’s claims—based on infringing conduct that began almost two decades earlier—may well have been untimely.

In any event, the Court’s explanation of how the injury rule protects defendants from stale claims says nothing about damages when a claim is timely under the discovery rule. If the Court in *Petrella* had been addressing a claim that was timely under the discovery rule, it would have said different things about how that claim accrued and the way the statute of limitations affected the availability of damages. For example, it would have explained that the statute of limitations protects defendants from stale claims because all claims for damages are cut off three years from when the putative plaintiff discovers his claim. But the Court’s bottom line about laches would have been

the same: “in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.” *Petrella*, 572 U.S. at 679.

Second, the Court in *Petrella* expressly addressed the discovery rule and preserved the question whether the discovery rule governs the accrual of copyright claims. The Court recognized that nine of our sister circuits apply the discovery rule to the kind of ordinary infringement claims that were at issue in *Petrella*. *See id.* at 670 n.4. The Court noted that it “[has] not passed on the question” of the discovery rule’s propriety and reserved that question for a future case. *Id.*

It would be inconsistent with *Petrella*’s preservation of the discovery rule to read *Petrella* to bar damages for claims that are timely under the discovery rule. *See Petrella*, 572 U.S. at 670 n.4. As the Ninth Circuit explained, “[t]here is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable.” *Starz Ent.*, 39 F.4th at 1244. Unless a plaintiff may recover damages for the infringement, the discovery and injury rules lead to the same result—retrospective relief only for harms occurring in the three years preceding the filing of the lawsuit. Because the Supreme Court expressly reserved the question of the discovery rule’s propriety, we cannot say it silently eliminated the discovery rule by capping damages for claims that are timely under that rule.

In response to this concern, the defendants argue that their reading of *Petrella* would allow a copyright plaintiff with a timely claim under the discovery rule to sue for injunctive relief, even if retrospective relief is unavailable. *See* 17 U.S.C. § 502. But the defendants have no explanation for why the statute of limitations would bar damages, but not other kinds of relief. Moreover, if a plaintiff did



not suffer damages in the three years preceding the lawsuit, there is likely no basis for a plaintiff to obtain injunctive relief. The harm is not ongoing and is unlikely to resume if it ceased long ago. And, although a copyright plaintiff may elect to recover statutory damages instead of actual damages and profits, *id.* § 504(c), those statutory damages would also be unavailable under the defendants' reading of *Petrella* because they remedy harm resulting from past violations of the Copyright Act and are therefore retrospective relief. See *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (explaining retrospective relief includes monetary compensation for “a past breach of a legal duty”). There is no escaping the conclusion that the defendants' position would gut the discovery rule by eliminating any meaningful relief for timely claims, even though the Court expressly left open whether a discovery rule applies to copyright claims.

In short, the defendants' reading of *Petrella* ignores the question presented, conflates the Court's discussion of claim accrual under the injury rule with the availability of damages under the discovery rule, and cannot be squared with the Court's express preservation of the discovery rule. For these reasons, we believe the Supreme Court in *Petrella* did not bar copyright damages in actions that are timely under the discovery rule.

## 2.

Having established that *Petrella* itself does not impose a separate bar on retrospective relief for an otherwise timely copyright claim, we turn to the Copyright Act's text to see if it supports such a bar. We conclude it does not.

The plain text of the Copyright Act's statute of limitations does not limit the remedies available on an otherwise

timely claim. The statute of limitations provides that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). A civil action is a proceeding “brought to enforce, redress, or protect a private right or civil right.” *Action*, *Black’s Law Dictionary* (11th ed. 2019). A remedy, on the other hand, is “[t]he means of enforcing a right or preventing or redressing a wrong.” *Remedy*, *Black’s Law Dictionary* (11th ed. 2019). A plaintiff cannot obtain a remedy without a timely civil action. But, if a plaintiff succeeds at maintaining a timely civil action, the inapplicable time-bar has little bearing on what a plaintiff may obtain as a remedy.

The Copyright Act’s damages provisions do not place a three-year limitation on the recovery of damages for past infringement. For a separate damages bar to exist, these damages provisions would have to limit a plaintiff’s recovery to something less than the harm caused by the infringement for which a defendant is liable. But they do not. Instead, the Copyright Act makes “an infringer of a copyright” liable for “the copyright owner’s actual damages and any additional profits of the infringer.” 17 U.S.C. § 504(a)(1). “Actual damages” are defined as “the actual damages suffered by [the plaintiff] as a result of the infringement.” *Id.* § 504(b). There is no bar to damages in a timely action.

Given that the plain text of the Copyright Act does not support the existence of a separate damages bar for an otherwise timely copyright claim, we hold that a copyright plaintiff with a timely claim under the discovery rule may recover retrospective relief for infringement that occurred more than three years prior to the filing of the lawsuit.

**IV.**

The district court certified the question of whether “damages in this copyright action are limited to the three-year lookback period as calculated from the date of the filing of the Complaint pursuant to the Copyright Act and *Petrella*.” We answer that question in the negative and conclude that where a copyright plaintiff has a timely claim for infringement occurring more than three years before the filing of the lawsuit, the plaintiff may obtain retrospective relief for that infringement.

Accordingly, the certified question is **ANSWERED**.

**APPENDIX B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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No. 18-CIV-25474-RAR

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SHERMAN NEALY, *et al.*,  
Plaintiffs,

v.

ATLANTIC RECORDING CORP., *et al.*,  
Defendants

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Filed: June 4, 2021

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**ORDER AFFIRMING AND ADOPTING REPORT  
AND RECOMMENDATION**

RUIZ II, United States District Judge.

**THIS CAUSE** comes before the Court on Magistrate Judge Jacqueline Becerra’s Report and Recommendation [ECF No. 224] (“Report”), entered on March 8, 2021. The Report recommends that the Court: (1) deny Defendants’ Motion to Strike Plaintiffs’ Response to Defendants’ Statement of Material Facts [ECF No. 193]; (2) grant Defendants’ Motion to Strike Affidavits of Stevens, Knox, and Baker [ECF No. 194]; (3) grant in part and deny in part Defendant’s Motion for Summary Judgment [ECF

No. 166]; and (4) deny Plaintiff's Motion for Partial Summary Judgment [ECF No. 175]. *See* Rep. at 2. Both parties filed objections to the Report [ECF Nos. 248 and 249].

The Court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the Report to which objections are made are accorded *de novo* review so long as those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the Report to which no specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

The Court having conducted a *de novo* review of the portions of the Report to which the parties' objected,<sup>1</sup> reviewed the remainder of the Report for clear error, and being otherwise fully advised, it is hereby

**ORDERED AND ADJUDGED** that the Report [ECF No. 224] is **AFFIRMED AND ADOPTED** as supplemented herein.

## **I. ANALYSIS**

Plaintiffs raise three objections to the Report. First, Plaintiffs contend that Magistrate Judge Becerra erred in finding that Plaintiffs lacked standing to bring a copyright infringement action on behalf of Music Specialist Publishing ("MSP") as to the songs "Jam the Box," "I Know You

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<sup>1</sup> As discussed below, the Court reviews Magistrate Judge Becerra's findings on the motions to strike for clear error even though Plaintiffs have objected to those findings.

Love Me,” and “Computer Language”<sup>2</sup> (collectively, “MSP-Registered Songs”).<sup>3</sup> *See* Pls.’ Obj. at 2. Second, Plaintiffs argue that Magistrate Judge Becerra erred in finding that the Supreme Court’s holding in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), limits damages to a three-year period prior to the commencement of a copyright suit. *Id.* at 10. And third, Plaintiffs aver that Magistrate Judge Becerra erred in finding that the affidavits of William Stevens, Esq. (“Stevens”) and George Knox, Esq. (“Knox”) should be stricken. *Id.* at 15.

Defendants also raise three objections to the Report. First, Defendants argue that they are entitled to summary judgment as to all the songs (not just the MSP-Registered Songs) because Plaintiff has not proven copyright ownership of any of the works at issue. *See* Defs.’ Obj. at 3-8. Second, Defendants contend that Magistrate Judge Becerra should have recommended dismissal of the entire case on statute of limitations grounds. *Id.* at 10-19. And third, Defendants argue that they are entitled to summary judgment because they obtained licenses from Tony Butler, who Plaintiffs have admitted is a co-owner of the copyrights in three of the works at issue: “Computer Language,” “I Know You Love Me,” and “Jam The Box.” *Id.* at 18-21.

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<sup>2</sup> For “Computer Language,” the copyright registration lists both MSP and Happy Stepchild Music Publ. Corporation as the claimants. *See* Rep. at 18.

<sup>3</sup> Magistrate Judge Becerra’s holding also applied to a fourth MSP-registered song, “When I Hear Music,” which has since been removed from the case by stipulation of the parties. *See* Pls.’ Resp. to Defs. Obj. [ECF No. 255] at 2, n.3. The songs “Fix It In The Mix” and “Freestyle Express” were also removed from the case by stipulation, *see id.* at 2, n.2, so the Court has excluded those songs from its analysis herein.

The Court will discuss each of the parties' objections in turn.

***I. Whether Plaintiffs lack standing to bring suit as to the MSP-Registered Songs***

In the Report, Magistrate Judge Becerra concluded that Plaintiffs Music Specialist, Inc. ("MSI") and Nealy have not established an ownership interest in the copyrights for the MSP-Registered Songs and therefore do not have standing to sue for infringement of those copyrights. *See* Rep. at 26-27. She reasoned that Plaintiffs are not listed as claimants in the copyright certificates for the MSP-Registered Songs; Plaintiffs only vaguely pleaded that MSP is affiliated with MSI; and there is no evidence in the record to support the allegation that MSP and MSI are affiliated. *Id.* Plaintiffs object to this finding and maintain they have standing to bring a copyright infringement suit for the MSP-Registered Songs. They argue that "the record is replete with evidence and testimony" showing that MSI has been affiliated with MSP since 1984 and "that MSP was a d/b/a of MSI that administered the publishing rights to, or was the publishing arm of, MSI." Pls.' Obj. at 10.

Under the Copyright Act, "only the legal or beneficial owner of an 'exclusive right' has standing to bring a copyright infringement action in a United States court." *Saregama India Ltd v. Mosley*, 635 F.3d 1284, 1290-91 (11th Cir. 2011) (citing 17 U.S.C. § 501(b)).<sup>4</sup> As the parties asserting a copyright infringement claim, Plaintiffs bear the burden of proving standing by demonstrating their

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<sup>4</sup> A "beneficial owner" typically refers to an author who has parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees. *See Smith v. Casey*, 741 F.3d 1236, 1241 (11th Cir. 2014).

ownership of the subject copyrights. *DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978, 986 (9th Cir. 2017); *Cramer v. Cecil Baker & Partners, Inc.*, No. 19-01503, 2019 WL 2774181, at \*2 (E.D. Pa. July 1, 2019) (citing *Clarity Software, LLC v. Fin. Indep. Grp.*, 51 F. Supp. 3d 577, 587 n.12 (W.D. Pa. 2014)). When the nonmoving party bears the burden of proof, “the movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against [it].” *Maxi-Taxi Of Fla., Inc. v. Lee Cty. Port Auth.*, 301 F. App’x 881, 885 (11th Cir. 2008).

Here, the Court agrees with Magistrate Judge Becerra that Plaintiffs’ evidence is insufficient to establish their ownership of the MSP-Registered Songs. Plaintiffs cite to the deposition testimony of MSI legal consultant Jonathan Black, who testified that during his time doing “some publishing administration work” for MSI, including setting up MSI’s music publishing catalog, he was responsible for preparing the copyright registrations and the corresponding songwriter agreements executed by Tony Butler for the MSP-registered songs “I Know You Love Me” and “Jam the Box.” *See* Pls.’ Obj. at 3-4. For “Jam the Box” and “Computer Language,” Plaintiffs also point to the fact that the Publisher Number indicated on the Copyright Office’s website registration is “Music Specialists MSI-109,” which Plaintiffs claim “is the three-letter symbol used by the Copyright Office to identify MSI and its registrations.” *Id.* at 5. Further, Plaintiffs rely on the fact that an MSI individual is listed as the agent for correspondence in the “Jam the Box” and “I Know You Love Me” copyright registration certificates. *Id.* at 6.



Additionally, Plaintiffs cite to deposition testimony from Nealy, Black, and recording artist Garfield Baker. *Id.* at 6-7. Baker testified that “maybe Music Specialist Publishing was some kind of d/b/a or whatever of Music Specialist, Inc., but I understood that to be the publishing arm of the Music Specialist Corp.” *Id.* Black testified “I’m not certain about this because that wasn’t under my direction, I believe that Music Specialist Publishing was a d/b/a of Music Specialist, Inc.” *Id.* at 9. Nealy testified that MSP was a separately incorporated legal entity from MSI, but then asserted that MSP was “a d/b/a” for MSI. *See* Dep. of Sherman Nealy [ECF No. 176-15] at 135:1-17, 234:18-25, 235:1-9.

At best, Plaintiffs’ evidence suggests an affiliation between MSI and MSP, which is not enough to satisfy the standing requirement for a copyright infringement suit. For example, in *Wallert v. Atlan*, the plaintiff brought a copyright infringement claim for a recording he allegedly composed and produced. 141 F. Supp. 3d 258, 264 (S.D.N.Y. 2015). The copyright registration for the recording listed as a copyright claimant a company named Moonstruck. *Id.* at 276. The plaintiff argued that he had standing because, among other reasons, he was the sole owner of Moonstruck. *Id.* The court disagreed that this was sufficient to confer standing, holding that

the . . . claim that Wallert, as owner of Moonstruck, is also the owner of Moonstruck’s copyright ownership of The Rock composition, is legally wrong. A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. Therefore, an individual shareholder, by virtue of his ownership of shares, does not own the corporation’s assets.

*Id.* at 276-77 (internal quotations and citations omitted).

Similarly, in *Big E. Ent., Inc. v. Zomba Enterprises, Inc.*, the court held that plaintiff Big East Entertainment did not have standing to sue for infringement of copyrights registered in the name of another company, despite the plaintiff's arguments that the companies had the same owner and had ultimately merged. 453 F. Supp. 2d 788, 796-98 (S.D.N.Y. 2006), *aff'd*, *Big E. Ent., Inc. v. Zomba Enterprises, Inc.*, 259 F. App'x 413 (2d Cir. 2008). The court reasoned that the copyright registration for the compositions at issue was in the name of B-Boy Records; there was no assignment of copyright from B-Boy Records to plaintiff; and there was no evidence to support plaintiff's merger allegation. *Id.* The court noted that plaintiff's owner's assertions, which were "contradictory and unsupported by documentary evidence," were insufficient to establish standing. *Id.* at 798.

Although a d/b/a relationship may be sufficient for standing in some circumstances, *see, e.g., Greg Young Publ'g, Inc. v. Zazzle, Inc.*, No. 16-04587, 2017 WL 2729584, at \*4 (C.D. Cal. May 1, 2017), Plaintiffs have not presented any documentary evidence of such a relationship. The only record evidence Plaintiffs have cited to support their position that MSP was a d/b/a of MSI is speculative testimony from Garfield and Black, coupled with Nealy's uncorroborated and contradictory testimony. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a genuine issue of fact."); *Cantrell v. Delta Airlines, Inc.*, 2 F. Supp. 2d 1460, 1463 (N.D. Ga. 1998) ("Plaintiff's self-contradictory testimony does not create an issue of fact necessary to defeat Defendant's motion for summary judgment.") (citing *Van T. Junkins and Assoc. v. U.S. Indus., Inc.*, 736 F.2d 656 (11th Cir. 1984)). Indeed, not only is Nealy's deposition testimony internally inconsistent, but his testimony that MSP was a d/b/a for MSI also conflicts with the affidavit

he filed in support of his motion to intervene in a separate case. There, Nealy states that “MSI is affiliated with Music Specialist Publishing.” Aff. of Sherman Nealy [ECF No. 212-1], *Baker v. Warner/Chappell Music, Inc.*, No. 14-22403 (S.D. Fla. June 8, 2017); *Tang v. Jinro America, Inc.*, No. 03-06477, 2005 WL 2548267, at \*4 (E.D.N.Y. 2005) (“In his deposition testimony, Plaintiff states both that he signed the agreement, and that he did not sign the agreement. Such inconsistency is not sufficient to create a ‘genuinely disputed’ issue of fact if only because a statement against [one’s] interest trumps one which is self-serving.”).<sup>5</sup>

Without establishing that MSP had no legal existence apart from MSI and was no more than an assumed name, Plaintiffs cannot receive the benefit of a presumption of legal ownership based on the copyright registrations for the MSP-Registered Songs. See *Architectural Body Rsch. Found. v. Reversible Destiny Found.*, 335 F. Supp. 3d 621, 642 (S.D.N.Y. 2018) (“If the plaintiff is not named on the registration as the owner, it has the additional burden of proving valid chain of title.”) (internal quotation omitted). The Court therefore finds that Plaintiffs have not shown ownership of the MSP-Registered Songs, which Plaintiffs must establish both for standing and as an element of their copyright infringement case. See *Urbont v. Sony Music Ent.*, 831 F.3d 80, 88, n. 6 (2d Cir. 2016).

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<sup>5</sup> Plaintiffs indicate that “Defendants *themselves* asserted, as an undisputed fact, that DMG negotiated the license to use ‘Jam the Box’ as an interpolation in ‘In the Ayer’ with an attorney representing Butler, 321 Music and ‘Music Specialist,’ a d/b/a of MSI.” *Id.* at 5 (quoting [ECF No. 167] ¶ 38). However, “allegations in a party’s statement of material facts are themselves not evidence.” *EarthCam, Inc. v. Ox-Blue Corp.*, 703 F. App’x 803, 812 (11th Cir. 2017).

## ***II. Whether Petrella limits damages to the three-year period prior to the lawsuit***

Plaintiffs next object to Magistrate Judge Becerra’s finding that Plaintiffs are limited to damages incurred during the three years prior to filing their lawsuit. Plaintiffs insist that the language in *Petrella* suggesting a strict three-year damages bar is dicta and that the discovery rule operates as an exception to the general rule barring recovery for infringements prior to the three-year window. *See* Pls.’ Obj. at 10-15.

The Court disagrees. Although the Eleventh Circuit has not addressed this specific issue, the Court finds—as the Second Circuit held in *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020)—that even where the discovery rule dictates the accrual of a copyright infringement claim, a three-year lookback period from the time a suit is filed must be used to determine the extent of the relief available. In *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the filing of a copyright infringement action. *Petrella*, 572 U.S. at 671-72, 77. As the Second Circuit persuasively reasoned in *Sohm*, the *Petrella* Court’s holding that laches was inapplicable to actions under the Copyright Act was partially based “on the conclusion that the statute ‘itself takes account of the delay’ by limiting damages to the three years prior to when suit is filed.” 959 F.3d at 52 (quoting *Petrella*, 572 U.S. at 677). The three-year limitation on damages was thus an integral part of the result in *Petrella* and is binding precedent—not mere dicta as Plaintiffs contend. *Id.* (“We are bound ‘not only [by] the result [of a Supreme Court opinion,] but also those portions of the opinion necessary to that result.’”) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)). Accordingly, Magistrate Judge Becerra correctly concluded that Plaintiffs’ poten-

tial damages in this case are limited to the three-year period prior to Plaintiffs filing suit.

***III. Whether the Knox and Stevens Affidavits were appropriately stricken***

The Court reviews Magistrate Judge Becerra’s striking of the Knox and Stevens affidavits for clear error. *See Moore v. M/V Sunny USA*, No. 18-81181, 2019 WL 7207109, at \*5 (S.D. Fla. Dec. 27, 2019), *aff’d*, No. 20-10092, 2021 WL 613696 (11th Cir. Feb. 17, 2021) (“A motion to strike . . . is a nondispositive motion that falls within [Federal Rule of Civil Procedure] 72’s clearly erroneous or contrary to law standard.”) (quotation omitted).

“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Pullman-Standard v. Swint*, 456 U.S. 273, 284 n.14 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 365, 395 (1948)); *see also United States v. Brown*, 947 F.3d 655, 673 (11th Cir. 2020) (citation omitted) (“[W]e have explained that a district court’s factual finding is clearly erroneous only if it leaves us with ‘a definite and firm conviction that a mistake has been committed.’”). “Clear error is a highly deferential standard of review.” *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005) (citation omitted). As courts in this Circuit have expressly noted, “a magistrate judge is afforded broad discretion in issuing nondispositive pretrial orders related to discovery.” *Triolo v. United States*, No. 18-91934, 2019 WL 5704659, at \*1 (M.D. Fla. Nov. 5, 2019) (citation and internal quotations omitted); *see also Sartori v. United States Army*, No. 17-679, 2019 WL 1116781, at \*1 (N.D. Fla. Mar. 9, 2019) (citation omitted) (“[W]hen reviewing a non-dispositive pretrial discovery order, the court affords ‘broad

discretion' to the magistrate judge.”). Thus, “[i]t is seldom easy to establish clear error.” *Brown*, 947 F.3d at 673 (citation and internal quotation omitted); *see also Nat'l Ass'n for the Advancement of Colored People v. Fla. Dep't of Corrs.*, 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000) (“The standard for overturning a Magistrate Judge’s Order is a very difficult one to meet.”).

The Court is not persuaded that Magistrate Judge Becerra’s striking of the Knox and Stevens affidavits was clearly erroneous. The Court agrees with Magistrate Judge Becerra that Plaintiffs’ failure to disclose Stevens and failure to disclose Knox’s knowledge of the copyright ownership and transfer agreements are neither substantially justified nor harmless. *See Lawver v. Hillcrest Hospice, Inc.*, 300 F. App’x 768, 770 (11th Cir. 2008) (“[W]hen a party fails to comply with [Federal Rule of Civil Procedure] 26, the district court does not abuse its discretion by striking an affidavit submitted in opposition to summary judgment, pursuant to Rule 37(c.)”; *Pete’s Towing Co. v. City of Tampa, Fla.*, 378 F. App’x 917, 919-20 (11th Cir. 2010) (upholding district court’s order striking portions of a witness affidavit because it “included allegations that had not been previously disclosed to Defendants in response to discovery requests.”).

#### ***IV. Whether Plaintiffs failed to establish ownership because they did not produce written transfer agreements***

Defendants contend that Magistrate Judge Becerra erred by not entering summary judgment in their favor as to all the songs at issue because Plaintiffs cannot establish ownership without producing written agreements showing assignment of the musical works from author Tony Butler. *See* Defs.’ Obj. at 4. Defendants cite to Section 204(a) of the Copyright Act, which provides that “[a]

transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."

Because the Court agrees with Magistrate Judge Becerra that Plaintiffs lack standing to sue as to the MSP-Registered Songs—and the songs "When I Hear Music," "Freestyle Express," and "Fix it in the Mix," were removed from the case by stipulation—the only remaining songs are "The Party Has Begun" and "Lookout Weekend." The copyright registrations for "The Party Has Begun" and "Lookout Weekend" indicate that these musical works were transferred from Butler to MSI by assignment. *See* Pls.' Statement of Facts, Ex. J [ECF No. 176-10]. Additionally, Nealy testified that during the relevant time period, there were songwriter agreements with Butler whereby Butler would have given MSI ownership of Butler's songs. *Id.*, Ex. O [ECF No. 176-15] ("Nealy Dep.") at 41. And another songwriter, Baker, recalled having signed songwriter agreements with MSI. *Id.*, Ex. D [ECF No. 176-4] at 4-5.

The Court agrees with Magistrate Judge Becerra that although Plaintiffs' evidence of ownership as to these remaining songs is thin, it is sufficient to withstand a motion for summary judgment. Further, considering there is evidence in the record that a writing was used to effectuate the transfer from Butler to MSI, Plaintiffs' failure to produce the written agreement is not fatal at this stage. *See Stillwater Ltd. v. Basilotta*, No. 16-01895, 2019 WL 1960277, at \*7 (C.D. Cal. Mar. 6, 2019) ("Unlike in cases where the dispute centered around the failure to transfer copyrights via a writing pursuant to § 204(a), here, there is evidence that a writing was used to effectuate the

transfer of the copyrights . . . , but that writing has been lost. Under the circumstances, the court finds that [Plaintiff] has shown title of ownership for purposes of standing.”); *Caravan, Ltd. v. Karin Stevens, Inc.*, No. 00-07664, 2001 WL 1426698, at \*1 (S.D.N.Y. Nov. 14, 2001) (“The purpose of section 204(a) . . . is to protect copyright owners from persons mistakenly or fraudulently claiming that a copyright was transferred orally, not to enable third parties to infringe on transferred copyrights whenever there is no formal writing effecting the transfer.”).

***V. Whether Plaintiffs’ claims are barred by the statute of limitations***

In the Report, Magistrate Judge Becerra concluded that the undisputed facts do not support a finding that Plaintiffs’ claims are barred by the three-year statute of limitations. Defendants contend that in reaching this conclusion, Magistrate Judge Becerra incorrectly applied the “express repudiation” standard that the Eleventh Circuit rejected in *Webster v. Dean Guitars*, 955 F.3d 1270 (11th Cir. 2020), by which a claim accrues when there is an express repudiation of ownership by one party against the other. Defs.’ Obj. at 9-10. Defendants argue that under the correct standard set by *Webster*—that “an ownership claim accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights,” 955 F.3d at 1276—Plaintiffs’ claims are time-barred.

Defendants insist that the following undisputed facts establish that Plaintiff had both actual and constructive knowledge of their claims. First, Defendants cite a June 9, 2008 meeting between Nealy and third-party Robert Crane where Nealy objected to Crane’s distribution of the compositions at issue in this case (“Crane Meeting”). Defs.’ Obj. at 12. Defendants argue that at the Crane



Meeting, Nealy learned that Butler had licensed the works to Crane’s companies, and that Plaintiffs’ actual notice of Butler’s adverse ownership claim establishes that Plaintiffs’ claims in this case are time-barred. *Id.* Second, Defendants argue that Plaintiffs had constructive notice of their claims based on the widespread distribution of several of the works at issue in this case. *Id.* at 14-15. Third, Defendants argue that the fact that Plaintiffs were not consistently receiving royalties for the songs at issue in this case should have caused Plaintiffs to investigate violations of their ownership rights. *Id.* at 16-17. Fourth, Defendants argue that Plaintiffs should have known about adverse ownership claims based on Broadcast Music, Inc.’s (“BMI”) public records—which showed Warner Chappell was claiming to administer the songs—and a September 2015 BMI royalty statement that Nealy received for the song “Fix It In The Mix,” which identified Warner Chappell as administrator. *Id.* at 16-18.

As an initial matter, the Court disagrees with Defendants that Magistrate Judge Becerra applied the “express repudiation” standard rejected in *Webster*. Magistrate Judge Becerra analyzed when Plaintiffs knew or should have known that Defendants were challenging their ownership of the musical works at issue. She considered the Crane Meeting and found that *Crane’s* challenge to Plaintiffs’ ownership did not necessarily put Plaintiffs on notice that *the Defendants in this case* were challenging their ownership rights. *See Rep.* at 38. She also analyzed Defendants arguments regarding widespread dissemination, royalties, and the BMI statement and determined that “reasonable minds could differ on the inferences arising from [the] undisputed facts, namely whether Nealy had reason to know that Defendants were infringing.” *Id.* at 38-41. In reaching this conclusion, Magistrate Judge Becerra took into account that Plaintiff was incarcerated

from March 1989 to March 2008 and then again from February 2012 to September 2015. She reasoned that the “should have learned” analysis involves considering “a reasonably prudent person in Plaintiff’s position.” *Id.* at 40 (citing *Sieger Suarez Architectural P’ship, Inc. v. Architectonica Int’l Corp.*, 998 F. Supp. 2d 1340, 1355 (S.D. Fla. 2014)); *see also On Top Recs. Corp. v. Sunflower Ent. Co.*, No. 15-22664, 2015 WL 13264196, at \*3 (S.D. Fla. Oct. 28, 2015) (“In infringement cases, ‘should have learned’ means whether a reasonably prudent person *in Plaintiff’s position* would have been aware of the alleged infringement.”) (emphasis added and internal quotations omitted). The Court agrees with Magistrate Judge Becerra’s analysis and therefore overrules Defendants’ objection that they are entitled to summary judgment on statute of limitations grounds.

***VI. Whether Defendants are entitled to summary judgment because they obtained licenses from Butler***

Defendants’ final objection is that they are immune from suit by Plaintiffs as to the songs “Computer Language,” “I Know You Love Me,” and “Jam the Box” because Plaintiffs admitted that Butler is a co-owner of these works and Defendants obtained licenses from Butler. *See* Defs.’ Obj. at 19. As discussed above, the Court finds that Plaintiffs lack standing to bring suit with respect to these MSP-Registered Songs. It is therefore unnecessary for the Court to reach this final argument advanced by Defendants.

**II. CONCLUSION**

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Report [ECF No. 224] is **AFFIRMED AND ADOPTED** as supplemented herein.
2. Defendants' Motion to Strike Plaintiffs' Response to Defendants' Statement of Material Facts [ECF No. 193] is **DENIED**.
3. Defendants' Motion to Strike Affidavits of Stevens, Knox, and Baker [ECF No. 194] is **GRANTED**.
4. Defendant's Motion for Summary Judgment [ECF No. 166] is **GRANTED IN PART AND DENIED IN PART** as summarized below.
  - a. Because Plaintiffs have not established ownership of the MSP-Registered Song "Jam The Box"—the only copyrighted work that Plaintiffs allege Atlantic Recording Corporation exploited—Defendant Atlantic Recording Corporation is entitled to final summary judgment as to all claims against Defendant Atlantic Recording Corporation in this matter. The Court shall enter a judgment as to Atlantic Recording Corporation by separate order.
  - b. Defendants Warner Chappell Music, Inc. and Artist Publishing Group, LLC, are entitled to summary judgment as to all claims with respect to each of the following musical compositions and/or sound recordings: "Jam The Box," "I Know You Love Me," and "Computer Language."
  - c. As to the remaining compositions, "Lookout Weekend," and "Party Has Begun," Plaintiffs' damages are limited to the time period commencing on December 28, 2015.

5. Plaintiff's Motion for Partial Summary Judgment [ECF No. 175] is **DENIED. DONE AND ORDERED** in Fort Lauderdale, Florida this 4th day of June, 2021.

**APPENDIX C**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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No. 18-CIV-25474-RAR

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SHERMAN NEALY, *et al.*,  
Plaintiffs,

v.

ATLANTIC RECORDING CORP., *et al.*,  
Defendants

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Filed: June 21, 2021

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**CERTIFICATION ORDER PURSUANT  
TO 28 U.S.C. § 1292(b) AND FED. R. CIV. P. 54(b)**

RUIZ II, United States District Judge.

**THIS CAUSE** comes before the Court upon the parties' *ore tenus* Motion for Certification of Appeal ("Motion") made at the Status Conference on June 8, 2021. Having considered the Motion and being otherwise fully advised, it is hereby

**ORDERED AND ADJUDGED** that the Motion is **GRANTED** as set forth herein.

**Certification Pursuant to 28 U.S.C. § 1292(b)**

Pursuant to 28 U.S.C. section 1292(b), an interlocutory appeal may be certified when three elements are present: (1) where the case presents a controlling question of law; (2) where there is a substantial ground for difference of opinion; and (3) where the appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). A “controlling question of law” arises where the appellate court can rule on a question of law without having to search deep into the record to discern the facts of the underlying case. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1252-53 (11th Cir. 2003).

The Court hereby certifies for immediate appeal its summary judgment determination that, even where the discovery rule dictates the accrual of a copyright claim, damages in this copyright action are limited to the three-year lookback period as calculated from the date of the filing of the Complaint pursuant to the Copyright Act and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).

The extent of recoverable damages is a controlling issue of law in this case and an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Plaintiffs have indicated that because the vast bulk of damages being sought fall outside of the three-year lookback period, limiting Plaintiffs’ recovery to the three years prior to Plaintiffs filing suit will render this matter no longer practical to pursue. The parties agree that the limitation of damages is a controlling issue of law, and the Court concurs. *See, e.g., Profit Point Tax Techns., Inc. v. DPAD Grp., LLP*, No. 19-cv-698, 2021 WL 1967961, at \*3 (W.D. Pa. May 17, 2021) (“A controlling issue of law is one that will end the litigation,” *citing Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir.

1990), and “may also be found where the issue is serious to the conduct of the litigation, either practically or legally,” citing *Katz v. Carte Balance Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)); see also *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (“resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation.”). An issue of law has also been termed controlling where, as is the case here, “the certified issue has precedential value for a large number of cases.” *Klinghoffer*, 921 F.2d at 24.

Further, a split of authority has developed among district courts on the applicable damages period, and consequently, there exists substantial grounds for a difference of opinion as contemplated by section 1292(b). The Court agrees with Defendants that the Supreme Court’s decision in *Petrella* is binding on this action and that, pursuant to the holding in *Petrella*, the three-year lookback for damages calculations must be applied despite operation of the discovery rule for accrual purposes. The Second Circuit adopted this position in *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020)—the only Circuit Court, post-*Petrella*, to address the issue. Plaintiffs, in contrast, urge the Court to adopt the Ninth Circuit’s pre-*Petrella* holding in *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004), which Plaintiffs contend was not affected by *Petrella*. See *Starz Entm’t, LLC v. MGM Domestic Television Distrib., LLC*, No. 20-04085, 2021 WL 566500 (C.D. Cal. Jan. 5, 2021). Both the Ninth Circuit in *Polar Bear* pre-*Petrella* and the district court in *Starz Entertainment* post-*Petrella* rejected the three-year damages limitation in cases where the discovery rule was applicable. While the Court disagrees with Plaintiffs, it finds there to be sufficient difference in the case law to warrant review pursuant to section 1292(b).

All the elements having been met, the issue of the three-year lookback period for Plaintiffs' recoverable damages in this copyright action is ripe and appropriate for appellate review.

**Certification Pursuant to Fed. R. Civ. P. 54(b)**

Additionally, pursuant to Fed R. Civ. P. 54(b), the Court hereby certifies the Final Judgment in favor of Atlantic Recording Corporation ("Atlantic") [ECF No. 257] as a final judgment and determines that there is no just reason to delay the appeal thereof. In determining whether an order is certifiable under Rule 54(b), the district court must engage in a two-step analysis. *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1127 (11th Cir. 2018). First, the district court "must decide whether the order is both 'final' and a 'judgment.'" *Id.* Second, the district court must find "that there is no just reason for delay in permitting the parties to appeal its decision immediately." *Id.* (quotation omitted).

The summary judgment ruling in favor of Atlantic determined that Plaintiffs could not support their claim of ownership over the musical works registered in the name of Music Specialist Publishing, including the only musical work Atlantic is alleged to have infringed, "Jam The Box." By dismissing claims relating to "Jam The Box," the judgment completely disposes of all claims against Atlantic and thus constitutes a Final Judgment as to Atlantic.

Rule 54(b) requires a determination that there is "no just reason for delay," taking into account "judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). A court should consider: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be



mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975), *overruled in part by Curtiss-Wright*, 446 U.S. 1.

Here, there is no just reason for delay based on the criteria set forth above. The unadjudicated claims all relate to musical compositions other than “Jam The Box,” so future developments in this Court will not moot the need for review. There is no possibility that the issue of Plaintiffs’ ownership over the composition “Jam The Box” would be the subject of recurrent appellate review. There is no counterclaim which will result in a set-off, and the interests of judicial economy support certification for immediate appeal, particularly in light of the Court’s concurrent certification pursuant to section 1292(b) of a controlling question of law regarding the scope of relief available herein and the stay of this matter pending the disposition of appellate review.

Accordingly, certification of the Final Judgment in favor of Atlantic as a final judgment is just and appropriate.

**DONE AND ORDERED** in Fort Lauderdale, Florida this 21st day of June, 2021.