

No. 22-1078

In The
Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC.,
and ARTIS PUBLISHING GROUP, LLC,

Petitioners,

v.

SHERMAN NEALY and
MUSIC SPECIALIST, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals**

BRIEF IN OPPOSITION

BRADY F. WILLIAMSON, ESQ.
SALZANO, LAMPERT &
WILSON, LLP
275 Madison Ave., 35th Floor
New York, NY 10016

PETER G. HERMAN
PETER HERMAN, P.A.
3020 NE 32nd Ave., Suite 226
Lauderdale, FL 33308

CHRIS KLEPPIN
CHELSEA LEWIS
ROBERT A. ROSENBERG*
Of Counsel
THE KLK LAW FIRM
8751 W. Broward Blvd.
Suite 105
Plantation, FL 33324
(954) 540-4713
grebnesor1942@gmail.com

**Counsel of Record*

QUESTION PRESENTED**I.**

The Copyright Act’s statute of limitations provision states that: “No 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). The Copyright Act’s damages provision states that: “the copyright owner[]” is entitled to “actual damages and any additional profits of the infringer”, 17 U.S.C. § 504(a)(1), which are defined as entitling the copyright owner “to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504(b). Notably, there is no time limitation on damages contained in § 504.

Whether § 504(b) should be amended by judicial fiat to limit damages to 3 years’ worth of actual damages and profits of the infringer, rather than interpreting § 504(b) through the plain meaning doctrine to conclude there is temporal limitation on damages for infringement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Sherman Nealy and Music Specialist, Inc. state that Music Specialist, Inc. is a privately held Florida corporation. None of its shares are held by a publicly traded company.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Statutory Provisions Involved	1
Introduction	2
Statement of the Case	6
Reasons for Not Granting the Writ	13
I. The decision below was decided consistent with established statutory interpretation principles; namely, the plain meaning doctrine, as the Petitioners desire to amend the damages provision of the copyright statute (§ 504) by having this Court place a 3-year limitation on it, when such a limitation does not appear in the statute itself, which warrants denial of the writ of certiorari	13
Conclusion.....	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>AMO Dev., LLC v. Alcon Vision, LLC</i> , 2022 WL 17475479 (D. Del.).....	3, 4
<i>Johnson v. United States</i> , 520 U.S. 461 (1997).....	18
<i>Nealy v. Warner Chappell Music, Inc.</i> , 60 F.4th 1325 (11th Cir. 2023).....	3, 4, 13, 15, 16, 18
<i>Papazian v. Sony Music Entm’t</i> , 2017 WL 4339662 (S.D.N.Y.)	4
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 572 U.S. 662 (2014)	3, 5, 10, 15-17, 19
<i>Sohm v. Scholastic</i> , 959 F.3d 39 (2d Cir. 2020)	2, 3, 4, 14, 15
<i>Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC</i> , 39 F.4th 1236 (9th Cir. 2022).....	3, 4, 15-18
<i>Webster v. Dean Guitars</i> , 955 F.3d 1270 (11th Cir. 2020)	5, 10, 11
STATUTES	
17 U.S.C. § 501	9
17 U.S.C. § 504	1-4, 13, 14, 16, 18, 19
17 U.S.C. § 504(a)(1)	13
17 U.S.C. § 504(b).....	13
17 U.S.C. § 507	1, 2, 5, 14, 16

TABLE OF AUTHORITIES—Continued

	Page
17 U.S.C. § 507(b).....	9, 12, 17-19
28 U.S.C. § 1292(b).....	10
 RULES	
Sup. Ct. R. 10	2
Sup. Ct. R. 10(a-c)	2
 OTHER AUTHORITIES	
<i>Black’s Law Dictionary</i> (11th ed. 2019)	12

STATUTORY PROVISIONS INVOLVED

We take strong issue with the Petitioners’ “Statutory Provision Involved” Section. The true statutory provisions that are involved are §§ 504 and 507 of the Act, which are the damages provision and the statute of limitations provisions respectively.

The damages provision of the Copyright Act states:

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504.

The statute of limitations provision of the Copyright Act states:

No 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.



INTRODUCTION

Petitioners have presented no “compelling reason” for its Petition for a Writ of *Certiorari* to be granted (“Petition”). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit’s opinion in this case (“Opinion”) is in conflict with a decision of this Court, but does set forth that it is in conflict with a decision of the Second Circuit Court of Appeals—*Sohm v. Scholastic*, 959 F.3d 39 (2d Cir. 2020). However, as set forth herein, the Opinion did not decide an important federal question that has not been settled by this Court, as the plain meaning of the statutory provisions by themselves or *in pari materia* simply do not limit *damages* under the Act to 3 years. *See* Sup. Ct. R. 10(a-c). Section 504 provides for numerous damages with no temporal limitation on them, while § 507 sets forth that a claim must be brought within 3 years after the claim accrued which for decades has been held to be within 3 years of when the plaintiff knew or should have known of the infringement.

While the Petition does argue that the Opinion is in conflict with a prior decision of this Court, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 662 (2014), it is not. *See, e.g., Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022); *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023). *Petrella* involved a wholly separate legal issue involving the application of laches as an affirmative defense under the unique facts of that case (which were that plaintiff’s counsel agreed to only seek damages going back 3 years from when suit was filed because he and his client knew of the infringement for 18 years and intentionally waited to file suit for strategic purposes), ultimately holding that laches does not apply to the Act. The Opinion and *Starz Entertainment* set forth how the only way to interpret the copyright statute’s damages provision (§ 504) is through its plain meaning; namely, that since there is no 3-year limitation on damages contained therein, it is not a court’s prerogative to read such a limitation into the statute, as that is a determination for Congress, which is free to amend the statute. The application of the plain meaning doctrine to § 504 requires the conclusion that the Petition is in fact frivolous.

Evidencing this is that despite the 2-1 circuit split, the Question Presented is hardly a vexing one to the district courts, as extremely few district courts follow *Sohm*, while the vast majority of the district courts follow the Opinion and *Starz Entertainment*. *See, e.g., AMO Dev., LLC v. Alcon Vision, LLC*, 2022 WL 17475479 n.1 (D. Del.) (collecting cases and noting “I

am following the vast majority of district courts that have previously addressed the issue”—few courts follow *Sohm* and of the 4 courts identified in *AMO* that did, *Nealy* was reversed and one other one is on appeal in the Fifth Circuit). Since this issue is not causing difficulties among the district courts, there simply is no reason to grant certiorari.

Further, the *Sohm* case was authored by Judge Sullivan who relied on his own opinion in *Papazian v. Sony Music Entm't*, 2017 WL 4339662, at *5 (S.D.N.Y.) issued when he was a district court judge and 2 other district court decisions. *Sohm*, 959 F.3d at 51. The paucity of decisions upon which *Sohm* relied for its holding and the same paucity of decisions following *Sohm* 2 years after it has been decided likewise warrants denial of certiorari.

The failure of the Petition to disclose § 504 and its wording to this Court is unforgivable. The “Question Presented” section of the Petition suggests that the Copyright Act contains a 3-year limitations period on damages by citing to the limitations period of the Act (§ 507), but the damages provision of the Act (§ 504) contains no such limitation. *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022); *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023). Thus, as *Starz Entertainment* and the Opinion hold as long as the Copyright Act claim is timely filed (it was here) there is no 3-year limitation on damages because § 504 does not contain such a limitation and the courts

should not amend the statute by judicial fiat to place such a limitation in the statute, as that is for Congress.

Further, the Petition, although it is not contained within the Question Presented, could be interpreted to raise the discovery rule that has long been applied to copyright cases because the Petition raises same in its * footnote. Petrella noted the discovery rule exists and that 9 circuit courts follow it. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 662 n.4 (2014) (noting that 9 circuit courts have held that in construing the statute of limitations section of the Act—§ 507—the plaintiff is required to file suit within 3 years of when the plaintiff knew or should have known his copyrighted work was infringed and stating that “[t]he overwhelming majority of courts use discovery accrual in copyright cases”).

Petitioners did not challenge the discovery rule below, and consequently cannot point to where it did so. In fact, Petitioners took the position that this is an ownership case and that as long as Plaintiffs filed suit within 3 years of when they knew or should have known of the infringement their claims were timely citing to the well-known *Webster* case in the Eleventh Circuit, which is reflected in the parties’ Joint Pretrial Stipulation, as noted in the Opinion. Thus, the application of the discovery rule is not before this Court in this Petition, because it was not before the lower courts. No court below weighed in on that question or suggested that the discovery rule was an issue in the case, and thus the discovery rule received no analysis or attention; it was not litigated. There was a finding by the

district court that record evidence exists that in fact Respondents did not know nor should they have known that their copyrighted works were infringed more than 3 years before suit was filed, which the trial court and the Opinion both recite.

◆

STATEMENT OF THE CASE

The district court certified the following question for interlocutory appellate review to the Eleventh Circuit: 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, the Eleventh Circuit answered the certified question by holding 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.”

The facts of this case are largely set forth in the published Opinion, and we base this section on the Opinion. The interlocutory appeal arose from Music Specialist, Inc. and Sherman Nealy’s copyright infringement suit against Warner Chappell Music, Inc.; Artist Publishing Group, LLC; and Atlantic Recording Corporation.

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. (R1). The licenses are invalid, MSI and Nealy say, because MSI and Nealy, not the third-party licensors, are the owners of the copyrights. (R1). The story of MSI and Nealy's alleged copyright ownership begins in the 1980s. At all times, Nealy was the sole owner and shareholder of MSI, and was listed as its president on the material corporate filings. MSI was Nealy's first venture in the music industry. Nealy provided the funding for MSI's operation, and Tony Butler who he collaborated with 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. Nealy and Nealy's and MSI'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 the Eleventh Circuit granted, resulting in the interlocutory appeal.

Nealy and MSI also attempted to appeal from the district court’s partial final judgment in favor of Atlantic, but the Eleventh Circuit dismissed that appeal for lack of jurisdiction. The Eleventh Circuit exercised its discretion under § 1292(b) to limit the issues in the appeal to the district court’s certified question.

The Opinion noted that under its 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 v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020). 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.*

The Opinion had 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." The Opinion noted that "the dispute in this case is materially indistinguishable from *Webster* for this purpose" and noted that Petitioners "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 Petitioners' 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 governed 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. The Eleventh Circuit assumed 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, because the

parties did not dispute the issue it deemed for purposes of the appeal that the plaintiffs' claims were timely under the discovery rule, the Opinion then determined "the question whether Nealy and MSI may recover retrospective relief for infringement that occurred more than three years before they filed this lawsuit."

The Opinion holds as follows:

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.

Nealy v. Warner Chappell Music, Inc., 60 F.4th 1325 (11th Cir. 2023).



REASONS FOR GRANTING THE WRIT

- I. **THE DECISION BELOW WAS DECIDED CONSISTENT WITH ESTABLISHED STATUTORY INTERPRETATION PRINCIPLES; NAMELY, THE PLAIN MEANING DOCTRINE, AS THE PETITIONERS DESIRE TO AMEND THE DAMAGES PROVISION OF THE COPYRIGHT STATUTE BY HAVING THIS COURT PLACE A 3-YEAR LIMITATION ON IT, WHEN SUCH A LIMITATION DOES NOT APPEAR IN THE STATUTE ITSELF, WHICH WARRANTS DENIAL OF THE WRIT OF CERTIORARI.**

Section 504, which is the damages provision of the Copyright Act, states:

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

- (1)** the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2)** statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504. The statute of limitations provision of the Copyright Act states:

No 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. There simply is no way to apply the applicable statutory interpretation rubrics in order to arrive at the conclusion advocated by *Sohm* and Petitioners, namely, that the Copyright Act should be

interpreted to contain a 3-year limitation for purposes of damages. Thus, while Judge Sullivan has done it twice, once while as a district court judge and once while as a circuit judge, very few other courts are following *Sohm*, and the Second Circuit, as the circuit court and district decisions continue to pile up rejecting *Sohm*, will eventually reconsider that decision *en banc* and reverse it. Thus, this Court will likely never have to resolve the “circuit split”. There is no need for this Court to state the obvious, as the Opinion and *Starz Entertainment* are particularly clear and cogent in their statutory interpretation and analysis of the Act. See, e.g., *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022); *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023).

The Petition lodges the following arguments concerning why certiorari should be granted: 1) the Opinion acknowledges a deepened circuit split on the issue; 2) the *Sohm* decision quoted certain language from *Petrella* concluding that *Petrella* “explicitly delimited damages to the three years prior to the commencement of a copyright infringement action”; 3) *Starz Entertainment* holds that the discovery rule “may extend a copyright defendant’s liability for damages beyond three years without limitation”; 4) the Court should reach the discovery rule and the question presented allows it to do that; 5) the Opinion deprives defendants of a predictable statute of limitations and opens the door for stale non-meritorious copyright claims.

The Petitioners' arguments, none of which has any merit, will be discussed in turn.

**The Opinion Does Not
Acknowledge a Deepened Circuit Split**

The Opinion hardly acknowledges a deepened circuit split. Rather, the Opinion plainly sets forth that § 504 cannot be amended by judicial fiat to include limiting language concerning damages. A read of *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022) and *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023) shows the application of the plain meaning rubric of statutory construction to §§ 504 and 507 in the Act. There is simply no room for any other interpretation, unless a court decides it wants to amend the statute. Thus, certiorari is not warranted.

***Petrella* Did Not “Explicitly Delimit
Damages To The Three Years Prior
To The Commencement Of A
Copyright Infringement Action”**

Petitioners contend that *Petrella* “explicitly delimited damages to the three years prior to the commencement of a copyright infringement action.” *Petrella* could not have done that, as *Petrella* simply determined whether laches (a potential affirmative defense to an equitable remedy such as an injunction) applied to the Act and held that it did not. *Petrella* did not interpret §§ 504 and 507 for purposes of determining the

extent of applicable damages in the Act. Further, *Petrella* had the odd procedural posture that the plaintiff in the case, in order to evade a potential laches affirmative defense, pled in the complaint that he was only seeking damages for the 3-year period of time before suit was commenced. In *Petrella*, the plaintiff knew of the infringement for 18 years, but the lawyer knew that the damages in the last 3 years were greater than the combined damages going back further than 3 years to when the infringement first began—approximately 18 years prior. To delimit damages under the Act, the Court would have had to have before it a case in which there was a dispute as to how far back in time the plaintiff’s damages went, but that was not an issue in *Petrella*. Rather, the Court simply acknowledged that the plaintiff pled damages in that case only going back 3 years from the commencement of the action. Nothing in the *Petrella* case warrants certiorari.

***Starz Entertainment Does Not Hold
That The Discovery Rule “May Extend A
Copyright Defendant’s Liability For Damages
Beyond Three Years Without Limitation”***

The Petition claims that *Starz Entertainment* holds that the discovery rule “may extend a copyright defendant’s liability for damages beyond three years without limitation.” The Opinion disagrees with Petitioners. The Opinion holds that *Starz Entertainment* “explained that reading *Petrella* to impose a [3-year limitation on damages] 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.” *Nealy*, 60 F.4th at 1331 (citing *Starz Entertainment*, 45 F.4th at 1245) (quoting 17 U.S.C. § 507(b)). Thus, both the Opinion and *Starz Entertainment* merely stand for the proposition that § 507(b), contrary to the position advocated by the Petitioners, does not limit damages, because it is a limitations period provision and the statute otherwise has a damages provision (§ 504), one conspicuously absent from the Petition, which has no temporal limitation on damages.

**The Court Should Not Reach
the Discovery Rule and the Questions
Presented Does Not Allow It To Do That**

On page 14 of the Petition in the * footnote, the Petition states that while there is no circuit split as to the application of the discovery rule to the Act, “this case would allow the Court to reach the question if it were so inclined, and it is encompassed within the question presented below.” The Petition continues by conceding the discovery rule was not challenged below (because to do so, it argues, would have been futile), but this Court and all circuit courts are bound by the precedent that to preserve error an objection must be made even if it were futile at the time. *Johnson v. United States*, 520 U.S. 461, 465–66 (1997) (holding that there is no exception to the rule allowing unpreserved error to be reviewed only for plain error, not even that it would have been futile to raise the objection below). Thus, the bizarre and misplaced request

by the Petitioners for this Court strike down the discovery rule when no challenge was made to same below should be denied, because it does not constitute plain error. In fact, *Petrella* noted that 9 circuits accepted the discovery doctrine and decided that commenting on it was not necessary for purposes of deciding the case. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 662 n.4 (2014). Petitioners' request for the Court to determine matters concerning which error was not preserved and which were not litigated below underscores the feeble nature of their arguments and highlights why the Petition should be denied.

The Opinion Does Not Deprive the Petitioners Of A Statute Of Limitations Defense

Petitioners argue that the Opinion deprives defendants of a predictable statute of limitations and opens the door for stale non-meritorious copyright claims. The Opinion does not do that. The statute of limitations is 3 years in a Copyright Action. 17 U.S.C. § 507(b). There is no disagreement in this case that the underlying action was timely filed. Applying the plain meaning of the statute as to the reach of damages, those damages go back to when the infringement started. 17 U.S.C. § 504. In a record that presents blatant copyright infringement the infringer should not be heard to complain it is being deprived of a statute of limitations defense—it made significant money infringing on Plaintiffs' copyrights. The claim is timely and now the infringer will be held to account for the blatant infringement, which is what the statute

contemplates. Petitioners seek to keep the significant money they made on the infringement, to which they are not entitled, as the copyrights were all registered, and Petitioners knew Plaintiffs held them, but they infringed anyway. Such facts do not warrant this Court rewriting a statute to absolve the Petitioners of their infringement and its consequences. This Court is just, and justice on the plain face of the Copyright Act is that the infringer has to pay for the infringement. The fact an admitted infringer is not happy about that is not a reason for this Court to grant certiorari. Rather, these simple facts and the simple statutory interpretation the Opinion applied warrant denial of the Petition.

◆

CONCLUSION

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

BRADY F. WILLIAMSON, ESQ.
SALZANO, LAMPERT &
WILSON, LLP
275 Madison Ave., 35th Floor
New York, NY 10016

PETER G. HERMAN
PETER HERMAN, P.A.
3020 NE 32nd Ave., Suite 226
Lauderdale, FL 33308

Respectfully submitted,

CHRIS KLEPPIN
CHELSEA LEWIS
ROBERT A. ROSENBERG*
Of Counsel
THE KKK LAW FIRM
8751 W. Broward Blvd.
Suite 105
Plantation, FL 33324
(954) 540-4713
grebnesor1942@gmail.com

**Counsel of Record*

June 2023