

No. 22-1078

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IN THE  
**Supreme Court of the United States**

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WARNER CHAPPELL MUSIC, INC., *et al.*,  
*Petitioners,*  
v.  
SHERMAN NEALY, *et al.*,  
*Respondents.*

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF OF *AMICUS CURIAE***  
**TYLER T. OCHOA**  
**IN SUPPORT OF NEITHER PARTY**

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**INTEREST OF *AMICUS CURIAE***

This brief *amicus curiae* in support of neither party is submitted pursuant to Rule 37 of the Rules of this Court.<sup>1</sup>

Tyler T. Ochoa is a Professor with the High Tech Law Institute at Santa Clara University School of Law. Professor Ochoa is a recognized expert in U.S. copyright law: he is currently the author of annual updates to the treatise *The Law of Copyright*, by the late Howard B. Abrams. He is also a co-author (with Craig Joyce and Michael Carroll) of a widely-used law school casebook, *Copyright Law* (11th ed. 2020), and the author of the Copyright chapter in the hornbook *Understanding Intellectual Property Law* (4th ed. 2020). He has published numerous articles on copyright law, including one cited by this Court in *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003). In addition to his expertise in copyright law, he has published three articles on statutes of limitations, co-authored with Andrew J. Wistrich, U.S. Magistrate Judge, Central District of California (retired).

Professor Ochoa is an unbiased observer who does not have any financial interest in the outcome of this litigation. The only interest he has is a scholarly interest in copyright law and statutes of limitations, and a commitment to the orderly development of both areas of law in the future. Indeed, after filing an

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the *amicus* made a monetary contribution to the preparation or submission of this brief. *Amicus*' university affiliation is for identification purposes only; *amicus*' university takes no position on this case.

amicus brief in the Ninth Circuit in a case involving the same issue raised here, Professor Ochoa has reconsidered and modified his views, based on additional research and thought.

### SUMMARY OF ARGUMENT

As restated by this Court, the Question Presented *assumes* that the discovery rule of accrual applies to the three-year statute of limitations in the Copyright Act. Although all of the Courts of Appeals to have considered the question have so held, this Court should start from first principles and reexamine that assumption. The text of the statute uses the word “accrued,” which has been interpreted in different statutes to mean a wrongful act or injury rule of accrual, or a discovery rule of accrual. The legislative history suggests that Congress intended a wrongful act rule of accrual, but that it recognized that courts might apply various “equitable tolling” doctrines, including fraudulent concealment.

Assuming the discovery rule applies, it operates on an all-or-nothing basis. If the plaintiff’s ownership is not disputed, the discovery rule allows a plaintiff to recover damages for *all* infringements, including those that occurred more than three years before filing, as long they filed within three years after they discovered, or reasonably should have discovered, the alleged infringement. If the plaintiff’s ownership is disputed, however (as in this case), lower courts have held that the *entire claim* is barred if not filed within three years of “express repudiation” of the plaintiff’s ownership, even as to those infringing acts that occurred within three years before the suit was filed. A wrongful act or injury rule of accrual would

eliminate this disparity, allowing a purported copyright owner to file suit *at any time* during the duration of the copyright, but limiting recovery to any infringing acts that occurred less than three years before the suit was filed.

### ARGUMENT

As restated by this Court, the Question Presented in this case *assumes* that the discovery rule of accrual applies: “Whether, *under the discovery accrual rule* applied by the circuit courts and the Copyright Act’s statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit” (emphasis added). If that assumption is accepted, the answer is clear: the *only* purpose of a discovery rule of accrual is to allow the plaintiff to recover damages that occurred *more than* three years before the lawsuit was filed. However, this Court should start from first principles and reexamine the assumption that the discovery rule of accrual applies, thereby addressing the question left open in *Petrella*. See Supreme Court Rule 14.1(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”).

If doing so, however, this Court should recognize that the discovery rule is thoroughly ingrained in the copyright jurisprudence of the lower courts, especially in cases involving disputes over copyright ownership. If the Court decides that Congress intended a wrongful act or injury rule of accrual, it will also have to decide whether a different rule of accrual should apply in cases where ownership is contested (such as this one).

**I. THE PLAIN LANGUAGE OF SECTION 507(b) DOES NOT RESOLVE THE QUESTION PRESENTED OR WHETHER THE DISCOVERY RULE APPLIES.**

Sometimes the language of a statute of limitations clearly indicates the rule of accrual to be applied. For example, in *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), the Fair Credit Reporting Act had a two-year statute of limitations “from the date on which the liability arises,” with an exception for claims based on willful misrepresentation, which were to be brought “within two years after [the plaintiff’s] discovery . . . of the misrepresentation.” *Id.* at 22. Not surprisingly, the Court held that absent willful misrepresentation, “the liability arises” at the time a statutory violation occurs. Similarly, where a statute expressly stated that the time period runs “from the date on which the violation occurs,” this Court applied the plain language of the statute. *Rotkiske v. Klemm*, 589 U.S. \_\_\_, 140 S. Ct. 355, 360 (2019).

A good example of a clearly-worded statute is found in the Patent Act, 35 U.S.C. § 286: “Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.” *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 337 (2017) (rejecting the argument that a statute begins running when ‘a plaintiff knows of a cause of action’). By contrast, the language of the Copyright Act (enacted just five years later) is not nearly as clear: “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). Nonetheless, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), this Court construed section 507(b) as creating “a three-year look-back limitations period,” *id.* at 670, similar in effect to the very different language of the Patent Act: “Thus, when a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder’s suit ordinarily will be timely under § 507(b) with respect to more recent acts of infringement (i.e., acts within the three-year window), but untimely with respect to prior acts of the same or similar kind.” *Id.* at 672.<sup>2</sup>

*Petrella*’s interpretation is consistent with the general rule. “Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). In general, therefore, “[a] copyright claim thus arises or ‘accrue[s]’ when an infringing act occurs.” *Petrella*, 572 U.S. at 670. But *Petrella* expressly and repeatedly qualified its construction of section 507(b) with language indicating that (or at least reserving the question whether) the three-year period is subject to exceptions.<sup>3</sup> It also acknowledged that every Court of Appeals to have considered the issue has adopted, “as an alternative to the incident of

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<sup>2</sup> The legislative history explains why Congress used different language in the Copyright Act and the Patent Act. *See* Part II.

<sup>3</sup> *See Petrella*, 572 U.S. at 670 (“A claim *ordinarily* accrues ...” and “the limitation period *generally* begins to run ...”) (emphasis added); *id.* at 672 (“the copyright holder’s suit *ordinarily* will be timely under § 507(b) [only] with respect to more recent acts of infringement (i.e., acts within the three-year window)”) (emphasis added).

injury rule, a ‘discovery rule,’ which starts the limitations period when ‘the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.’” *Id.* at 670 n.4, quoting *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009); see also *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124-25 & n.3 (2d Cir. 2014); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §12.05[B][2][b] (LexisNexis 2023 rev.); Howard B. Abrams & Tyler T. Ochoa, *The Law of Copyright* §16:16 (Clark Boardman Callaghan 2023 rev.) (collecting cases).

As this Court has acknowledged, “Federal courts ... generally apply a discovery accrual rule when a statute is silent on the issue.” *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Accord, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997), citing *Connors v. Hallmark & Son Coal Co.*, 935 F. 2d 336, 342 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.) (“the discovery rule is to be applied in all federal question cases in the absence of a contrary directive from Congress.”).<sup>4</sup> But this Court has also cautioned that “we have not adopted that position as our own,” *TRW, Inc.*, 534 U.S. at 27 (Ginsburg, J.); and Justices Scalia and Thomas

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<sup>4</sup> See, e.g., *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (applying discovery rule to a latent disease claim under the Federal Employers Liability Act); *United States v. Kubrick*, 444 U.S. 111, 120 & n.7 (1979) (applying discovery rule to medical malpractice claim under the Federal Tort Claims Act); see also 1 Calvin W. Corman, *Limitation of Actions* §6.1, p. 378 (1991) (“during the past several decades many courts have concluded that certain actions accrue only when the plaintiff discovers or reasonably should discover the injury.”); *id.* at §6.5.5.1., p. 449 (characterizing the discovery rule as “the general federal rule of accrual.”).

have criticized the expansive use of the discovery rule as a “bad wine of recent vintage,” *id.* at 37 (Scalia, J., concurring); *Rotkiske*, 140 S. Ct. at 360-61 (Thomas, J.).

Ultimately, as this Court has observed, one must conclude that the word “accrued” is ambiguous:

We do not think it is possible to assign to the word ‘accrued’ any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but the uncertainty [may be] removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

*Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926). It is therefore appropriate to examine the legislative history of the statute, to see if it sheds light on the intended meaning of Congress.

## **II. THE LEGISLATIVE HISTORY OF SECTION 507(b) SUGGESTS, BUT DOES NOT COMPEL, THE CONCLUSION THAT CONGRESS ASSUMED AND INTENDED A WRONGFUL ACT RULE OF ACCRUAL.**

The 1909 Copyright Act provided that criminal proceedings had to be “commenced within three years after the cause of action arose.” Act of March 4, 1909, Pub. L. 60-349, ch. 320, § 39, 35 Stat. 1084. No limitation period was provided for civil infringement

actions. In accordance with the prevailing practice at the time, for civil infringement actions federal courts borrowed the statutes of limitation for analogous actions in the various states. *See Brady v. Daly*, 175 U.S. 148, 158 (1899); *McCaleb v., Fox Film Corp.*, 299 F. 48, 50 (5th Cir. 1924).

Five decades later, Congress found this practice “naturally can result in a wide divergence of time periods with respect to the limitation on the commencement of civil copyright actions .... [and] also permits ‘forum shopping’ by claimants.” S. Rep. No. 85-1014, at 2 (1957), *reprinted at* 1957 U.S.C.C.A.N. 1961-62. Congress heard testimony that the relevant state limitation periods ranged from one year to eight years. *Id.* at 2, 1957 U.S.C.C.A.N. at 1962. Accordingly, Congress determined “that irrespective of the length of a period it is highly desirable to provide a uniform period throughout the United States.” *Id.*

On September 7, 1957, Congress enacted the statutory language at issue: “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).<sup>5</sup> It reenacted the criminal statute of limitations at the same time, without commenting on the different language (“after the cause of action arose” versus “after the claim accrued”).<sup>6</sup> One might infer from the different

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<sup>5</sup> The 1957 language was identical, except that it used “the same” instead of the pronoun “it.” Pub. L. 85-313, § 1, 71 Stat. 633.

<sup>6</sup> The only comment in the Senate Report was that “[a]ctions brought under the criminal copyright provisions are extremely rare. Therefore, the Committee sees no substantial reason for not having statutes of equal periods for both criminal and civil



language that a different meaning was intended; but the inference is weak. Although some courts have suggested that “arose” implies a wrongful act rule or injury rule, while “accrued” implies an injury rule or a discovery rule,<sup>7</sup> this Court generally has treated the two terms as interchangeable. *See, e.g., Petrella*, 572 U.S. at 670 (“A copyright claim thus arises or ‘accrue[s]’ when an infringing act occurs.”).<sup>8</sup> The language of the criminal statute dates back to 1909, and it is more likely that the reenactment was used merely to renumber it, rather than to imply any difference in meaning.<sup>9</sup>

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copyright actions.” S. Rep. No. 85-1014, at 2, 1957 U.S.C.C.A.N. at 1962.

<sup>7</sup> *See, e.g., Duffy v. CBS Corp.*, 182 A.3d 166, 179-80, 182-83 (Md. 2018) (latent disease claim arises upon injury/exposure and accrues upon discovery); *Murphy v. Owens-Corning Fiberglass Corp.*, 550 S.E.2d 589, 594 (S.C. App. 2001) (latent disease claim arose upon exposure in South Carolina, but did not accrue until diagnosis in Virginia), *aff’d*, 590 S.E.2d 479, (S.C. 2003) (disagreeing, holding “arose” and “accrued” are interchangeable, but nonetheless reaching the same result).

<sup>8</sup> *See also United States v. Lindsay*, 346 U.S. 568, 569 (1954) (“In common parlance a right accrues when it comes into existence.... Giving ‘accrued’ its normal meaning would therefore bar all claims not sued on within six years from the date they arose”); *Baltimore & Ohio S.W. R.R. Co. v. Carroll*, 280 U.S. 491, 495 (1930) (“The cause of action which arises from death accrues at the time of death, and the two-year period of limitation then begins.”); *cf. St. Louis & San Francisco R.R. Co. v. Spiller*, 274 U.S. 304, 313 (1927) (in a different context, “[w]e are of opinion that the term ‘arise’ was used ... as the equivalent of ‘accrue’”).

<sup>9</sup> In 1947, §39 of the 1909 Act was codified at former 17 U.S.C. §115. Ten years later, Congress renumbered the existing criminal statute as former 17 U.S.C. §115(a), and it added the

Other evidence from the legislative history is collected and analyzed in Judge Lewis Kaplan's scholarly opinion in *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 244-47 (S.D.N.Y. 2004), in which he concluded that Congress likely intended a wrongful act rule of accrual, rather than the discovery rule. Judge Kaplan began by drawing an inference from the legislative purpose:

[T]he goal of a uniform three year limitations period was to remove the uncertainty concerning timeliness that had plagued the copyright bar. Given that the goal was a *fixed* [uniform] statute of limitations, it seems unlikely that Congress intended that accrual of an infringement claim—and hence the length of the interval between an infringement and the statutory time bar—would depend on something as indefinite as when the copyright owner learned of the infringement.

*Auscape*, 409 F. Supp. 2d at 245 (emphasis in original). Judge Kaplan also noted that the witnesses who testified in the House appeared to assume that a wrongful act rule of accrual would apply. As the Senate Report states:

At the House Hearing, ... [i]t was pointed out that due to the nature of publication of works of art that generally the person injured receives reasonably prompt notice or

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civil statute of limitations as former 17 U.S.C. §115(b). In the 1976 Act, the two provisions were reenacted again as 17 U.S.C. §507(a) & (b). Section 507(a), the criminal statute of limitations, has since been amended twice.

can easily ascertain any infringement of his rights. The Committee agrees that 3 years is an appropriate period ... *and that it would provide an adequate opportunity for the injured party to commence his action.*

S. Rep. No. 85-1014, at 2, 1957 U.S.C.C.A.N. at 1962 (emphasis added).<sup>10</sup> Moreover, in a hypothetical question at the House Hearings, a representative of the motion picture industry testified that “[e]very performance of every moving picture is a separate infringement,” so that if a movie was shown once in a small town, and not shown again within three years, an infringement action would be barred.<sup>11</sup> “Thus, Congress was well aware that the statute of limitations it was enacting would not necessarily allow a remedy for every wrong.” *Auscape*, 409 F. Supp. 2d at 246.

In later rejecting Judge Kaplan’s conclusions in *Auscape*, the Second Circuit did not grapple with the testimony that he cited or the inferences he drew from it. *See Psihoyos*, 748 F.3d at 124 & n.4.<sup>12</sup> The Third

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<sup>10</sup> *See also Auscape*, 409 F. Supp. 2d at 245 (“At the hearings, it was pointed out that ‘copyright infringement by its very nature is not a secretive matter.’ To the contrary, it is ‘an act which normally involves the general publication of the work or its public performance.’”) (quoting testimony from the House Hearings).

<sup>11</sup> *Auscape*, 409 F. Supp. 2d at 246 (quoting testimony of Fulton Brylawski, Association of American Motion Pictures).

<sup>12</sup> *See also 3 Nimmer on Copyright*, §12.05[B][2][b] (“Although only a district court opinion, *Auscape* represents a fine articulation of how to compute the Copyright Act’s statute of limitations.... [*Psihoyos*] eliminates Judge Kaplan’s ruling as a matter of *stare decisis*. But the circuit’s failure to grapple with his logic leaves the rationale undergirding *Auscape* unassailed. To date,

Circuit was more thorough; but its analysis relies almost entirely on the assumption that there must be a distinction between the words “accrued” in the civil statute of limitations and “arose” in the criminal statute, and on its assumption that the discovery rule is the default rule of accrual. *William A. Graham Co.*, 568 F.3d at 434-35.

The House and Senate Reports also explain why Congress used different language in section 507(b) than in the patent statute of limitations:

The Committee wishes to emphasize that it is the Committee’s intention that the statute of limitations, contained in this bill, is to extend to the remedy of the person affected thereby, and not to his substantive rights. With regard to this point the House Report states:

It may be well to point out that statutes of limitations take the form of a limitation upon the substantive right or upon the remedy. Under the former, the right of action is extinguished at the end of the period and the courts usually have no jurisdiction with regard to actions that are not instituted within the appropriate period. In addition, the courts generally do not permit the intervention of equitable defenses of estoppel where there is a limitation on the right.

Under the remedial type of statute, the basic right is not extinguished, but the limitation

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all Courts of Appeals have adopted the discovery rule, leaving only *logic* in support of the injury rule.”) (emphasis in original).

is applied merely to the remedy. In some instances the right itself can be enforced collaterally.... Equitable considerations are available to prolong the time for bringing suit in such cases where there exist the disabilities of insanity or infancy, absence of the defendant from the jurisdiction, fraudulent concealment, etc.

As far as this Committee has been able to ascertain, all state statutes of limitation, which now govern the federal courts in copyright actions, are limitations upon the remedy, and the present bill has been drawn to apply this concept to a uniform federal period of limitations. The Committee has not been unmindful that the 6-year statute of limitations in the Patent Code (35 U.S.C. 286) is a limitation upon the substantive right rather than upon the remedy. However, the relatively longer period of limitation provided therein compensates for the difference in concept. Moreover, it was considered that the long-standing fact that both the copyright bar and the courts have become accustomed to a limitation based upon the remedy warranted a continuation of this concept in the present bill.

S. Rep. No. 85-1014, at 3, 1957 U.S.C.C.A.N. at 1963, *quoting* H.R. Rep. No. 85-150, at 2 (1957). Based on this intent, both the House and Senate Committees expressly considered the Librarian of Congress's suggestion that certain specific equitable tolling doctrines be recognized in the statute. The Senate Committee responded by saying:

With respect to the question of specifically enumerating various equitable situations on which the statute of limitations is generally suspended, the House Judiciary Committee reached the conclusion that this was unnecessary, inasmuch as the 'Federal district courts, generally, recognize these equitable defenses anyway.' This Committee concurs in that conclusion.... A specific enumeration of certain circumstances or conditions might result in unfairness to some persons.

S. Rep. 85-1014, at 3, 1957 U.S.C.C.A.N. at 1963. The discovery rule of accrual was not mentioned as one of the "equitable situations" that were proposed to be incorporated into the bill, or that Congress believed would be recognized by the Federal district courts. However, the Librarian of Congress specifically mentioned that he did not consider an exception for fraudulent concealment to be necessary, and that he therefore did not include it in his draft list of exceptions; but that he would not oppose it. *Id.* at 5, 1957 U.S.C.C.A.N. at 1964-65.

Thus, one can perhaps infer from the legislative history that Congress intended to allow courts to take "equitable considerations" into account "to prolong the time for bringing suit" in certain situations, including fraudulent concealment.<sup>13</sup> As explained in Part VI

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<sup>13</sup> *But see id.* at 5, 1957 U.S.C.C.A.N. at 1965 ("It is the opinion of the Register of Copyrights, which I share, that the nature of copyright infringement is such as to render it unlikely that many cases would arise where fraudulent concealment would be a material problem.") (Letter of L. Quincy Mumford, Librarian of Congress, to Hon. Emmanuel Celler, Chairman of House Judiciary Committee).

below, however, a fraudulent concealment exception is much narrower than applying the discovery rule as a general rule of accrual.

**III. CASES INVOLVING DISPUTES AS TO OWNERSHIP, INCLUDING THIS CASE, ARE ADEQUATELY RESOLVED BY A WRONGFUL ACT RULE, SO THEY NEED NOT BE TREATED DIFFERENTLY FROM ORDINARY INFRINGEMENT ACTIONS.**

The contested issue in this case concerns copyright ownership: plaintiffs claim to own registered copyrights in eight musical works, either as works made for hire or by assignment; while the defendants rely on licenses from the composer and performer. The courts of appeals have not only held that the discovery rule applies to disputes concerning copyright ownership, but they have also held that it can bar infringement claims that would have been timely under *Petrella*'s separate-act rule of accrual. This harsh application of the discovery rule is inconsistent with *Petrella*, and it should be rejected. *See Everly v. Everly*, 958 F.3d 442, 468 (6th Cir. 2020) (Murphy, J., concurring) (“[if] the Copyright Act’s statute of limitations contains an occurrence rule, not a discovery rule ... [then] that change will likely require courts to reassess their plain-and-express-repudiation tests, which have long followed a discovery-rule model.”).

The cases applying the discovery rule to ownership disputes trace their lineage to the Second Circuit’s holding in *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992). In *Stone*, the plaintiff learned she was the illegitimate daughter of deceased country singer Hank Williams, Sr., and she sued for a declaratory

judgment that she was entitled to a share of his copyrights with the defendants (Williams' widow and son), and an accounting of profits earned by them. The Second Circuit reasoned that “[b]ecause a declaratory judgment action is a procedural device used to vindicate substantive rights, it is time-barred only if relief on a direct claim based on such rights would also be barred.” *Id.* at 1048. It then held, based in part on a state-court finding that the relationship had been fraudulently concealed from her, that “the statute of limitations did not begin to run until plaintiff had reason to know of the facts giving rise to her statutory entitlement, *i.e.*, that she was a child of Williams.” *Id.* It then affirmed a finding that she had such knowledge no later than October 17, 1979, nearly six years before she filed the lawsuit. *Id.* at 1048-49. Nonetheless, the court held that Stone was entitled to recover her share of any profits that had been earned within three years of filing the lawsuit. *Id.* at 1049-51. “To hold otherwise would ignore the long established rule that statutes of limitations bar remedies, not the assertion of rights.” *Id.* at 1051.

In other words, *the discovery rule was completely irrelevant to the outcome.* The court in *Stone* reached the *exact same result* as would have been reached with a wrongful act rule under *Petrella*'s separate accrual principle. But the Second Circuit and other courts of appeals have applied the discovery rule to *completely* bar *all* remedies if the lawsuit was filed more than three years after “express repudiation” of a claim of ownership or co-ownership. *See Abrams & Ochoa*, §16.20 (collecting cases). Those courts reasoned that “claims of co-ownership, as distinct from claims of infringement, accrue when plain and express repudiation of co-ownership is communicated to the claimant,



and are barred three years from the time of repudiation.” *Zuill v. Shanahan*, 80 F.3d 1366, 1369 (9th Cir. 1996); accord, *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996) (distinguishing *Stone* as involving “highly idiosyncratic facts”). Moreover, those courts have also applied the discovery rule to infringement claims when the only disputed element is ownership. See, e.g., *Webster v. Dean Guitars*, 955 F.3d 1270, 1274, 1276 (11th Cir. 2020) (where “the ‘gravamen’ of Webster’s claim of copyright infringement was ownership,” “unlike an ordinary copyright infringement claim, which accrues for each infringing act, a claim concerning mainly ownership accrues only once.”).

As Judge Eric Murphy of the Sixth Circuit has cogently explained:

[T]he express repudiation] test has two problems. The statute’s text adopts an *occurrence rule* that starts the limitations period on the date that the claim “accrued”—that is, the date that the claim came into existence (whether or not a plaintiff knows of it). 17 U.S.C. § 507(b). But our test follows a *discovery rule* that starts the limitations period on the date that a plaintiff should have known that another author has repudiated the plaintiff’s authorship interest. Next, the statute’s text starts the limitations period not just when anything accrues but when a *claim* accrues—that is, when the plaintiff has a completed cause of action for relief whose elements have all been met. Our test treats a party’s authorship or ownership as a “claim” even though it is merely one element of a claim

for copyright infringement (between a copyright owner and a third-party infringer) or an equitable distribution of royalties (between co-owners).

*Garza v. Everly*, 59 F.4th 876, 885 (6th Cir. 2020) (Murphy, J., concurring) (citations omitted; emphasis in original). *See also Everly*, 958 F.3d at 465 (Murphy, J., concurring) (“a declaration is a remedy, not a claim, and its main benefit is to allow parties to learn their rights before a claim has accrued.”) (citations and internal quotes omitted).

Interpreting section 507(b) to adopt a wrongful act rule of accrual will not only limit parties to three years of monetary remedies, but combining it with *Petrella*’s separate accrual rule will also assure that courts can hear and determine ownership disputes *at any time* during the duration of the copyright, as long as at least one of the claimed owners has exploited the copyright during the past three years. If an action is timely for any infringing acts that have occurred in the past three years, it should remain timely even if ownership of the copyright is one of the contested issues. *See Everly*, 958 F.3d at 465 (Murphy, J., concurring) (“the distinction ‘is artificial: there is no justification ... for treating continuing claims of authorship any differently than continuing acts of infringement.” (quoting 6 William F. Patry, *Patry on Copyright* §20:37 (West 2020 rev.)) (ellipsis added).

It is true that this approach will sometimes allow (and require) disputes concerning copyright authorship (and therefore ownership) to be resolved many years after the creation of the work. But that is a result of the lengthy duration of copyright, and of

*Petrella* adopting a separate accrual rule for infringement actions and eliminating laches as a defense. Unless the Court is willing to revisit those holdings, or to adopt a separate rule of accrual for cases in which ownership is a contested element of the claim (as in this case), then Judge Murphy is correct: under the wrongful act rule of accrual, combined with *Petrella*'s separate accrual rule, a putative copyright owner or co-owner may try to establish ownership and recover damages and profits that "accrued" during the last three years *at any time* during the duration of the copyright, without regard to the date of discovery.<sup>14</sup>

**IV. IF THE DISCOVERY RULE APPLIES, IT PERMITS RECOVERY OF DAMAGES FOR INFRINGEMENTS THAT OCCURRED MORE THAN THREE YEARS BEFORE SUIT WAS FILED.**

When the discovery rule applies, it allows damages to be recovered for acts occurring *more* than three years before an action was filed, as long as the plaintiff filed the action within three years of the date she discovered, or reasonably should have discovered, the existence of the claim. For example, in *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004), the defendant infringed by using footage from the plaintiff's copyrighted work at twelve different trade shows between 1995 and 1998. *Id.* at 704. Polar Bear first became aware of the infringement when a producer attended one of the trade shows on August 9, 1997.

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<sup>14</sup> The doctrines of *res judicata* and collateral estoppel will effectively prevent putative authors/owners from abusing the system with serial claims of infringement.

*Id.* at 707. “Polar Bear filed its complaint against Timex on August 3, 2000, and thus Polar Bear commenced its suit ‘within three years after the claim accrued.’” *Id.* Timex argued that section 507(b) “prohibits copyright plaintiffs from obtaining any damages resulting from infringement occurring more than three years before filing the copyright action, regardless of the date the plaintiff discovered the infringement.” *Id.* at 706. The Ninth Circuit rejected that argument, holding instead that:

§ 507(b) permits damages occurring outside of the three-year window, so long as the copyright owner did not discover—and reasonably could not have discovered—the infringement before the commencement of the three-year limitation period. Because Polar Bear did not discover Timex’s infringement until within three years of filing suit, Polar Bear may recover damages for infringement that occurred outside of the three-year window.

*Id.*

Similarly, in *Psihoyos* the defendant allegedly infringed eight of the plaintiff’s photographs by publishing them without authorization “in various textbooks” between 2005 and 2009. The plaintiff discovered the infringement in November 2010, when Wiley sought a retroactive license for one of the photos. He sued for infringement in March 2011. A three-year lookback period would have limited damages to infringements that occurred no earlier than March 2008; but the court held “that under the discovery rule[,] *none* of Psihoyos’s claims are time-barred.” 748 F.3d at 124 (emphasis added); *see also id.*

at 125 (“we conclude that copyright infringement claims do not accrue until actual or constructive discovery of the relevant infringement and that the Act’s statute of limitations did not bar *any* of Psihoyos’s infringement claims.”) (emphasis added).

Assuming the discovery rule applies, nothing in this Court’s subsequent opinion in *Petrella* changed, or even purported to change, how the discovery rule operates. In *Petrella*, there was no question that the discovery rule did not apply, and she did not claim that it did. Petrella’s claim was based on her ownership of the renewal term in her father’s 1963 screenplay, on which the 1980 movie *Raging Bull* was based.<sup>15</sup> 572 U.S. at 673-74. Her claim accrued at the beginning of the renewal term, on January 1, 1992.<sup>16</sup> At that time, Petrella was fully aware that *Raging Bull* had been based, in part, on her father’s screenplay; that the movie had been released; and that it continued to be publicly performed and distributed to the public on videotape, so she could not credibly claim the benefit of the discovery rule.<sup>17</sup> Nonetheless, she

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<sup>15</sup> For works published or registered between 1909 and 1977, the Copyright Act provided an initial term of 28 years, which could be renewed for a second term. 17 U.S.C. § 304(a) (1991). At the time Petrella registered the renewal term in her father’s screenplay, in 1991, the second term had a duration of 47 years. *Id.* In 1998, the renewal term was extended to 67 years, for a total of 95 years of copyright protection. 17 U.S.C. § 304(b).

<sup>16</sup> For a work registered in 1963, the initial 28-year term lasted until December 31, 1991. 17 U.S.C. § 305 (“All terms of copyright ... run to the end of the calendar year in which they would otherwise expire.”).

<sup>17</sup> As the Ninth Circuit stated in dismissing Petrella’s claims on grounds of laches, “it is undisputed Petrella was aware of her

delayed filing suit until January 6, 2009. Accordingly, this Court held she could claim damages “only for acts of infringement occurring on or after January 6, 2006.” *Id.* at 675. There was no further need to discuss or to rule on any aspect of the discovery rule, because it obviously did not apply to Petrella’s claim, so it would not have affected the outcome.

## **V. THE SECOND CIRCUIT’S OPINION IN *SOHM* EFFECTIVELY ELIMINATES THE DISCOVERY RULE WHILE PURPORTING TO PRESERVE IT.**

In *Sohm v. Scholastic, Inc.*, 959 F.3d 39 (2d Cir. 2020), photographer Sohm licensed publisher Scholastic to use numerous photographs in its publications. The licenses were granted between 1995 and 2011. First Amended Complaint ¶11. In May 2016, Sohm sued Scholastic for infringement, alleging that it had exceeded the contractual limitations in the licenses as to the “number of copies, distribution area, language, duration, and/or media.” First Amended Complaint, ¶11. After discovery revealed details of the infringements, Sohm filed an amended complaint, alleging 117 infringing uses of 89 different photographs. 959 F.3d at 42.

Sohm moved for summary judgment with respect to 13 uses; Scholastic responded that the claims were barred by the statute of limitations. “Scholastic [did]

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potential claims (as was MGM) since 1991, when her attorney filed her renewal application for the 1963 screenplay.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 952 (9th Cir. 2012) (internal quotes and brackets omitted), *rev’d on other grounds*, 572 U.S. 663 (2014) (holding laches could not bar an action that was timely filed within the three-year statute of limitations).

not contend that Plaintiffs had actual notice of the relevant infringements, but rather [it argued] that Plaintiffs, with due diligence, *should have* discovered the infringing acts more than three years before bringing their claims.” *Sohm v. Scholastic, Inc.*, 2018 WL 1605214, at \*11 (S.D.N.Y. Mar. 29, 2018) (emphasis added). The district court rejected the argument: “Without identifying any information that would have *prompted* such an inquiry, ... Scholastic cannot simply rely on the passage of time to establish that Plaintiffs reasonably should have discovered any infringement.” *Id.* (emphasis in original). Scholastic also argued that under *Petrella*, the claims accrued at the time the infringements had occurred. The district court dismissed that argument in a footnote. *Id.* at n.21. Accordingly, the district court “reject[ed] Scholastic’s argument that damages should be limited to three years before the filing of this case.” *Id.* at \*11.

On appeal, the Second Circuit held that “[t]he Supreme Court [in *Petrella*] has not overruled *Psihoyos*, either implicitly or explicitly, and therefore we must continue to apply the discovery rule.” 959 F.3d at 50. The Second Circuit also upheld the district court’s determination that Scholastic had failed to demonstrate that Sohms should have discovered the infringements at an earlier time. *Id.* at 51. “Accordingly, the district court properly rejected Scholastic’s affirmative defense based on the Copyright Act’s statute of limitations.” *Id.*

Then, in a departure from the usual operation of the discovery rule, the Second Circuit nonetheless held that “in *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the commencement of a copyright infringement action.”

*Id.*; see also *id.* at 52 (“we must apply the discovery rule to determine when a copyright infringement claim accrues, but a three-year lookback period from the time a suit is filed to determine the extent of the relief available” and “a plaintiff’s recovery is limited to damages incurred during the three years prior to filing suit.”).

With due respect to the Second Circuit, this dual holding is inherently self-contradictory. Under *Petrella*’s separate-accrual rule, any damages resulting from infringements that occurred within three years of filing can *already* be recovered under the three-year statute of limitations, *even if* the plaintiff had long been aware that the defendant was infringing.<sup>18</sup> The discovery rule is *only* needed or useful to recover damages for infringements that occurred *more* than three years before suit was filed, in those cases in which a plaintiff was blamelessly ignorant that those infringements had occurred.<sup>19</sup> In such cases, the discovery rule allows the plaintiff to file suit within three years of the date that it reasonably became aware of the infringement, rather than within three years of the date of the infringing act. By

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<sup>18</sup> Indeed, that is precisely what happened in *Petrella*: she was allowed to recover damages for infringements occurring within three years before the date she filed suit in 2009, even though she had been aware of the existence of her claim since 1991, some 18 years earlier.

<sup>19</sup> As one lower court has stated, “[i]f plaintiffs cannot recover for infringements that occurred more than three years before the lawsuit commenced, even if they were not aware of the infringements, then the discovery rule serves no practical purpose.” *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 510 F. Supp. 3d 878, 887 (C.D. Cal. 2021), *aff’d*, 39 F.4th 1236 (9th Cir. 2022).



limiting damages to three years before the date the suit was filed, the court in effect was adopting an injury rule of accrual, even though it claimed that it was using the discovery rule of accrual. *Sohm* effectively eliminates the discovery rule while purporting to preserve it.

Attempting to justify its decision, the court stated “that *Petrella*’s plain language explicitly dissociated the Copyright Act’s statute of limitations from its time limit on damages.” *Sohm*, 959 F.3d at 52. That assertion is simply incorrect. *Petrella*’s three-year “time limit on damages” was *expressly* based on the Copyright Act’s three-year statute of limitations. See *Petrella*, 572 U.S. at 670 (describing 17 U.S.C. § 507(b) as “a three-year look-back limitations period”); *id.* at 672 (“the copyright holder’s suit *ordinarily* will be timely *under § 507(b)* [only] with respect to more recent acts of infringement (*i.e.*, acts within the three-year window”) (emphasis added); *id.* at 672 (“§ 507(b)’s limitations period ... allows plaintiffs during [the copyright] term to gain retrospective relief running only three years back from the date the complaint was filed.”).

*Sohm*’s self-contradictory reasoning did not go unnoticed. Within three months of the decision, Prof. Ochoa published a blog post criticizing the decision. See Tyler Ochoa, *A Second Circuit Panel Misunderstands the Copyright Act’s Statute of Limitations*, at <https://blog.ericgoldman.org/archives/2020/08/a-second-circuit-panel-misunderstands-the-copyright-acts-statute-of-limitations-guest-blog-post.htm> (Aug. 7, 2020); see also Abrams & Ochoa, §16:18. Nimmer agrees that the *Sohm* opinion’s reasoning is tortured.

See *Nimmer on Copyright* §12.05[B][2][d][ii] (“But, immediately after nominally reaffirming the discovery rule, *Sohm v. Scholastic* took a hundred-and-eighty degree turn.... In sum, the practical import of this case is to adopt the injury rule and reject the discovery rule that it had previously upheld.”). Lower courts have likewise recognized that *Sohm*’s interpretation of *Petrella* “effectively obliterates the discovery rule.” *Mitchell v. Capitol Records, LLC*, 287 F. Supp. 3d 673, 677 (W.D. Ky. 2017) (rejecting a similar argument pre-*Sohm*); see also *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 510 F. Supp. 3d 878, 887 (C.D. Cal. 2021) (“a strict damages bar would ‘eviscerate’ the discovery rule”), *aff’d*, 39 F.4th 1236, 1244 (9th Cir. 2022) (“a damages bar would render the ‘discovery rule’ functionally identical to the ‘incident of injury’ rule.”).<sup>20</sup>

In short, although *Sohm* reaches the correct result under the wrongful-act rule of accrual, that result cannot be squared with the discovery rule. If the discovery rule applies, the result in *Sohm* is incorrect. If the wrongful-act rule applies, the result in *Sohm* (but not its reasoning) is correct.

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<sup>20</sup> Indeed, even those district courts that agree with *Sohm* recognize that the effect of limiting damages to a three-year lookback period “appears to be the functional equivalent of an occurrence rule [of accrual].” *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 761 (S.D. Ohio 2021); see also *id.* at 761 (adopting such an interpretation of *Petrella* “functionally overrules the discovery rule”); *id.* at 762 (“as a practical matter, the effects of a limited three-year lookback [period] result in a form of [the] occurrence rule”).

**VI. IF AN EXCEPTION FOR FRAUDULENT CONCEALMENT EXISTS, THAT IS NOT THE SAME AS ADOPTING A DISCOVERY RULE OF ACCRUAL GENERALLY, AND IT WOULD NOT APPLY TO THIS CASE.**

As this Court explained in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), the discovery rule originated in cases of alleged fraud, where relief was sought in courts of equity, and was later applied to cases at law.

In *Bailey*, the Bankrupt Act of 1867 provided that “no suit at law or in equity shall in any case be maintainable ... unless the same shall be brought *within two years from the time of the cause of action accrued ...*” *Id.* at 344 (quoting the statute; emphasis added by the Court). *Bailey*, the assignee in bankruptcy, filed suit to set aside an alleged fraudulent conveyance, more than three years after he was appointed, and more than two years after the debtor had been discharged. The Court held that the discovery rule applied, even though the plain language of the statute did not admit of any exceptions:

[W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, [even] though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

*Id.* at 348. *Accord, Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey*). The Court explained

that this principle was generally applicable to cases involving fraud:

[S]tatutes of limitation ... were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence.... To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

*Bailey*, 88 U.S. at 349. *See also Holmberg*, 327 U.S. at 397 (“This equitable doctrine is read into every federal statute of limitation.”); *Rotella*, 528 U.S. at 560 (“federal statutes of limitations are generally subject to equitable principles of tolling.”) (citing *Holmberg*).

Consequently, this Court has held that unless a statute of limitations is jurisdictional, it is subject to a rebuttable presumption that equitable tolling applies. *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990) (“Time requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling.’”); *id.* at 95-96 (describing this principle as a “rebuttable presumption”); *United States v. Wong*, 575 U.S. 402, 407-08, 412 (2015) (applying *Irwin*’s rebuttable presumption to the Federal Tort Claims Act). This Court has cautioned, however, that *Holmberg* “stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general

presumption applicable across all contexts.” *TRW, Inc.*, 534 U.S. at 27.

Assuming that “fraudulent concealment of a cause of action by the defendant will toll the statute of limitations[,] ... two elements are required before this equitable principle is applicable: the plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment.” *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 (5th Cir. 1971). Here, Plaintiff Nealy alleges that he was unaware of the infringement because he was in prison between 1989 and 2008, and again from 2012 to 2015.<sup>21</sup> There is no allegation that the defendants concealed any of the facts or any of their allegedly infringing activities from the plaintiffs, much less that they did so by fraudulent means.

## CONCLUSION

As Professor Nimmer has concluded, “the discovery rule is inherently in conflict with a rolling statute of limitations,” which is the interpretation adopted by this Court in *Petrella. Nimmer on Copyright* §12.05[B][2][c][i]. This Court “could avoid these conundrums by siding instead with the injury rule rather than the discovery rule. It is submitted that the *injury rule* [together with *Petrella*] ... best effectuates sound copyright policy by safeguarding defendants in infringement suits from excessive relief.” *Id.* at §12.05[B][2][c][iii] (emphasis in original).

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<sup>21</sup> The district court held there was a genuine issue of material fact whether Nealy reasonably could have discovered the alleged infringement during the period between 2008 and 2012.

The Second Circuit in *Sohm* held that *even if* the discovery rule applies, *Petrella* nonetheless requires that damages be limited to those infringing acts occurring within three years before filing, regardless of the date of discovery. In effect, *Sohm* applies a “wrongful act” or injury rule of accrual while purporting to retain the discovery rule. Assuming the discovery rule applies, it operates in the manner that the Second and Ninth Circuits held in *Psihoyos* and *Polar Bear*, respectively. But if the wrongful act or injury rule applies, then *Petrella* allows a putative copyright owner (such as Nealy) to file suit to recover three years’ worth of damages *at any time* during the life of the copyright, without regard to the date of discovery.

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