

No. 22-1078

IN THE
Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC., *et al.*,

Petitioners,

v.

SHERMAN NEALY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF OF FORMER REGISTER OF COPYRIGHTS
RALPH OMAN AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Ralph Oman served as the Register of Copyrights from 1985 to 1993. As Register, he advised Congress on copyright policy and testified more than forty times on proposed copyright legislation and treaties, and on the state of the U.S. Copyright Office. Before then, Mr. Oman served on the staff of the Senate Subcommittee on Patents, Trademarks, and Copyrights, including as Chief Counsel from 1982 to 1985. He was personally involved in the final stages of the drafting and passage of the Copyright Act of 1976, 17 U.S.C. 101 *et seq.* As Register, Mr. Oman was responsible for helping transition U.S. copyright law from the analog to the digital age and was part of the government team that convinced the world community to protect computer software as a literary work under national copyright laws. Mr. Oman recently retired from the George Washington University Law School, where he served as the Pravel, Hewitt, Kimball, and Kreiger Professorial Lecturer in Intellectual Property and Patent Law and taught copyright law for thirty years.

Mr. Oman now writes to urge this Court to decide only the narrow, remedies-focused question directed by the Question Presented, and not to opine on the propriety of the discovery-accrual rule in Section 507(b) of the Copyright Act. If, however, the Court does opine on the propriety of the discovery-accrual

¹ No counsel for a party authored this brief in whole or in part, and no person other than *Amicus*' counsel made a monetary contribution to fund the preparation or submission of this brief.

rule, it should affirm that Section 507(b) incorporates a discovery rule. Particularly given his prior service in the development of U.S. copyright law, Mr. Oman has a direct interest in the proper resolution of the issues presented by this case.

SUMMARY OF THE ARGUMENT

The text and history of U.S. copyright statutes support applying a “discovery rule” under Section 507(b). Since 1957, when Congress first enacted a statute of limitations for civil cases of copyright infringement in Section 507(b), Congress has specifically considered two very different textual approaches: a broadly written accrual clause on the one hand, and a narrowly written clause that expressly embodies a three-year look-back limitation on recovery. The broad language appears in Section 507(b). The narrow look-back language appears in a handful of other specific provisions of copyright law, but not in Section 507(b).

That choice must be given meaning. These few other statutes represent a clear statutory exception to the broad accrual rule in Section 507(b). And these differing statutes are not the result of an oversight. In 1957, Congress specifically considered this narrowly written look-back clause for a proposed portion of the Copyright Act, but Congress chose not to include that language in Section 507(b). Since 1957, Congress has enacted narrowly written look-back clauses in other copyright statutes, but Congress has never amended the broad language in Section 507(b).

These instances where Congress enacted an express look-back period triggered by the date of infringement reflected a specific balance of policy considerations; in each instance, Congress expanded copyright protection in a targeted way, such as by waiving sovereign immunity for suits against the government. But that expansion came at a price: a limitation on the ability to recover for infringement.

Petitioners brush past the textual distinctions throughout U.S. copyright statutes and instead ask this Court to conclude that Section 507(b) has the same meaning as language that Congress specifically rejected for Section 507(b) and has specifically enacted in *other* provisions of copyright law. That rewriting of the statute must be rejected.

Petitioners also misconstrue the common-law origins of the discovery rule. As this Court's cases show, claim "accrual" traditionally and conventionally refers to the moment when the plaintiff had notice of the claim. That rule does not depend on whether the plaintiff suffers any specific harm such as fraud or disease, but instead turns on whether the injury is latent and might not be readily apparent. As the Courts of Appeals have recognized for decades, that framework applies comfortably to copyright infringement, which can be difficult to detect.

Accordingly, contrary to Petitioners' main contention, Section 507(b) is not an example of courts supposedly inventing an unjustified doctrine that the discovery rule applies when the statute is silent on the issue—the alleged bad wine of recent vintage. To the

contrary, the Copyright Act is not silent on the issue, and this appeal is the wrong vehicle to make sweeping pronouncements about the discovery-accrual rule.

ARGUMENT

The Question Presented asks “[w]hether, under the discovery accrual rule applied by the circuit courts and the Copyright Act’s statute of limitations . . . a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.” Eleven federal courts of appeals apply the discovery-accrual rule to the Copyright Act.²

As Petitioners recognize, this Question Presented “assumes that the Copyright Act contains a ‘discovery accrual rule applied by the circuit courts.’” Pet’r Br.

² See *Warren Freedensfeld Assocs. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008); *Sohm v. Scholastic Inc.*, 959 F.3d 39, 50 (2d Cir. 2020); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433-37 (3d Cir. 2009); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997); *Martinelli v. Hearst Newspapers, LLC*, 65 F.4th 231, 233 (5th Cir. 2023); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004); *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Starz Entm’t, LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1238 (9th Cir. 2022); *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1015 (10th Cir. 2013); *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1330 (11th Cir. 2023), cert. granted in part sub nom. *Warner Chappell Music v. Sherman Nealy*, No. 22-1078, 2023 WL 6319656 (U.S. Sept. 29, 2023). Although Petitioners and *amici* suggest the discovery-accrual rule should perhaps depend on whether the claim concerns copyright ownership or copyright infringement, nothing in the text of the Copyright Act supports drawing such a distinction.

31. Petitioners take aim at that assumption in the balance of its brief, suggesting that this Court’s decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.* “compel[s]” discarding the discovery rule, *id.* at 13, even though *Petrella* expressly says otherwise, 572 U.S. 663, 670 n.4 (2014). But Petitioners’ gambit to have this Court discard the discovery-accrual rule is misguided and ignores key textual, structural, and historical evidence that demonstrates that this Court’s instruction to assume that the discovery rule applies was entirely proper. This Court should not disturb the lower courts’ unanimous application of the discovery-accrual rule for federal copyright infringement claims.

I. The Text, Structure, And History Of The Copyright Act Instructs That A Discovery Rule Is Appropriate

Petitioners’ invitation to discard the discovery rule turns nearly entirely on their argument concerning interpretation of the word “accrues.” Pet’r Br. 17. Petitioners’ mode of analysis misses the mark.

Rather, in interpreting Section 507(b) of the Copyright Act, this Court “must, as usual, interpret the relevant words not in a vacuum, but with reference to the statutory context,” *Torres v. Lynch*, 578 U.S. 452, 459 (2016) (interpreting the statutory phrase, “described in”), as well as by “reference to the statutory . . . ‘structure, history, and purpose,’” *Abramski v. United States*, 573 U.S. 169, 179 (2014) (interpreting “person”) (quoting *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (interpreting “in connection with”)). That is be-

cause, as this Court has instructed, “the word ‘accrued’” lacks “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 is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions[.]” *Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926).

On this score, the Copyright Act’s “structure, history, and purpose,” *Abramski*, 573 U.S. at 179, all speak with a single voice: Section 507(b)’s three-year statute of limitations accrues, or begins to run, “when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.” *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009).

A. The Text And History Of The Act Suggests A Discovery Rule

The Copyright Act, enacted in 1909, prescribed a three-year statute of limitations for criminal copyright infringement; however, the statute did not set forth a limitations period for civil infringement actions. See David E. Harrell, *Difficulty Counting Backwards from Three: Conflicting Interpretations of the Statute of Limitations on Civil Copyright Infringement*, 48 SMU L. Rev. 669, 671 (1995). Thus, “[i]n civil infringement actions, federal courts continued to apply the statutes of limitations of the state in which suit was filed.” *Ibid.*

In 1957, Congress amended the Copyright Act of 1909 to provide a three-year limitations period for civil copyright infringement: “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). Petitioners say that, at the time of this amendment, Congress “kn[ew] how to enact a broad discovery rule when it wishes,” and cite in support a hodgepodge of statutes that have nothing to do with copyright infringement. Pet’r Br. 20-21 (citing, *e.g.*, antitrust and customs laws). But this argument ignores key provisions germane to copyright infringement—and indeed, part of the proposed 1957 amendments to the Act itself—that show, beyond any doubt, that Congress understood Section 507(b) to encompass a discovery-accrual rule.

1. The most compelling evidence on this front concerns Congress’s decades-long debates over whether to extend copyright protection to a narrow type of work, and the statutes of limitations Congress considered in those proposed bills at the same time Congress drafted Section 507(b).

Going back to the early 20th century, Congress repeatedly considered extending copyright protection to designs of useful articles and other industrial designs, such as designs of chairs or lamps. For example, under pre-1957 and current law, the design of a table lamp is not copyrightable, but if the base of the lamp is a statuette in the shape of dancing figures, then that part of the lamp is copyrightable because the base is either physically or conceptually separable from the

functional elements of the lamp. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 416 (2d Cir. 1985). Beginning in 1914, bills were introduced in Congress to extend protection to industrial designs, but those bills were met with resistance.

Highly relevant to this appeal is a bill introduced in 1957 by Congressman Edwin Willis. That 1957 bill sought to extend copyright protection to designs of useful articles, as well as to provide a statute of limitations for civil copyright infringement actions concerning such designs. See H.R. 8873 (Willis Bill), 85th Cong., 1st Sess. (July 23, 1957) (reprinted in 39 J. Pat. Off. Soc’y 596 (1957)). As Congressman Willis explained, H.R. 8873 was to amend the Copyright Act itself: “the bill contains a section in relation to the copyright law and an amendment of the copyright law—title 17, United States Code.” 103 Cong. Rec. 12505 (July 23, 1957). This 1957 bill was a major event—its design-protection provision “had been developed over a period of 3 years by the Coordinating Committee on Designs of the National Council for Patent Law Associations, with the Copyright and Patent Offices participating in drafting and discussing the measure.” See Report of the Register of Copyrights, at 7 (1958), <https://www.copyright.gov/reports/annual/archive/ar-1958.pdf>. The design provision of the bill ultimately did not pass; however, Congress did enact Section 507(b) (71 Stat. 633), which is the relevant statute of limitations for civil copyright infringement actions today.

The Willis Bill would have provided only a diluted version of copyright protection for designs of useful articles. For example, the term of protection was limited to five to ten years. H.R. 8873, Section 5.

The more important limitation, for present purposes, was that the design provision of the 1957 bill contained express language that would *limit* relief for infringement to acts in the three years pre-dating the complaint: “No recovery . . . shall be had for any infringement committed more than three years prior to the filing of the complaint.” *Id.* at Section 23(b). This language did two things. First, it stated that the date the “infringement” was “committed”—not the date of discovery—is the trigger for the limitations period. Second, it limited damages to the three years pre-dating the complaint.

This language was *not* incorporated into the text of Section 507(b), even though Congress was considering that text simultaneously. If Congress had intended in 1957 for Section 507(b) to embody a date-of-infringement accrual rule or a three-year look-back, it knew how to revise Section 507(b) to say exactly that. Instead, Congress retained the much broader formulation in Section 507(b). That choice should be given meaning. See *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022) (discussing the meaningful-variation canon) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)).

Proving the point, just two years later, the design provision of the 1957 Willis Bill was reintroduced as a

stand-alone measure with minor amendments in the Senate, where it received a hearing before the Patent, Trademark and Copyright Subcommittee. S. 2075 (O'Mahoney-Wiley-Hart Bill), 86th Cong., 1st Sess. (May 28, 1959). This bill, S. 2075, like its predecessor, contained the same limitation—no recovery would be available for “any infringement committed more than three years prior to the filing of the complaint.” See *id.* at Section 23(b) (reprinted in Hearing Before the Subcommittee on Patents, Trademarks, and Copyrights (June 29, 1960)). By this time, of course, Section 507(b) had been enacted. If Petitioners were correct that Section 507(b) already embodied a date-of-commission rule and a three-year look-back, then S. 2075 would have simply used the language from Section 507(b). But S. 2075 did not do that. Instead, S. 2075 proposed a different and narrower right of recovery for holders of this potential new form of copyright. Thus, in 1957 and again in 1959, Congress was aware of the difference between the broad accrual language in Section 507(b) and the narrow look-back language Congress was considering for design copyrights. These drafting choices should be given meaning.

This history repeated itself when Congress next examined the Copyright Act—a similar version of this design-protection bill as a stand-alone title of the comprehensive copyright reform legislation (94th Congress, S. 22) passed the Senate in February 1976. *Amicus* had a front-row seat, literally, during such passage, sitting in the jump seat in the first row next to Senator Hugh Scott of Pennsylvania, who was the co-floor manager of S. 22. This design-protection title was

subsequently stripped out of S. 22 by the House, which deemed copyright protection for industrial designs undesirable. See *Carol Barnhart Inc.*, 773 F.2d at 416-17 n.4. Even so, it should be noted that the dropped provision contained the same date-of-infringement and three-year look-back language as the failed 1957 and 1959 bills. S. 22, Section 222(b). It should also be noted that Congress, in finally enacting the general revision in 1976, albeit without the design protection title, was careful not to change the broad language of Section 507(b) or to adopt the limitation language of the industrial design title.

The terminus of this history was in 1998, when Congress amended the Copyright Act to include copyright protection for designs of boat hulls—the Vessel Hull Design Protection Act (“VHDPA”). See Digital Millennium Copyright Act, Pub. L. No. 105-304, tit. V, 112 Stat. 2860, 2905 (1998), codified at 17 U.S.C. 1301 *et seq.* The VHDPA used as a template the design bills that Congress considered in 1957, 1959, and 1976; the text of the VHDPA grants copyright protection to “an original design of a useful article” but then defines “useful article” to mean boat hulls. 17 U.S.C. 1301(a)(1), (b)(2).³ The VHDPA contains a “Statute of

³ The text of the core provisions of the 1957 Willis Bill and the VHDPA are remarkably similar. The 1957 Willis Bill states: “The author of an original ornamental design of a useful article, or his legal representatives or assigns, may secure the protection provided by this Act upon complying with and subject to the provisions hereof. An ornamental design of a useful article, hereinafter referred to as ‘design,’ is a design of the article that includes features of shape, pattern, configuration, or ornamentation in-

Limitations” that expressly bars recovery “for any infringement committed more than 3 years before the date on which the complaint is filed.” 17 U.S.C. 1323(c).⁴ Again, Congress did not amend Section 507(b) to add any look-back provision.

Congress’s decades-long efforts to amend the Copyright Act to grant protection for designs of useful articles is precisely the type of statutory history that sheds light on statutory meaning. See *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1898) (“In construing any act of legislation, . . . regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law[.]”).

Here, that meaning is clear. There was no reason to draft the date-of-infringement and look-back provision in the 1957 bill and enact them in the VHDPA if Section 507(b)’s much broader language already embodied those rules. If Congress intended claims under Section 507(b) to “accrue” upon infringement rather

tended to give the article an attractive, artistic, or distinctive appearance and not merely utilitarian or functional in purpose.” H.R. 8873, Section 1(a)–(b)(1). The VHDPA states: “The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.” 17 U.S.C. 1301(a)(1).

⁴ Section 507(b) of Title 17 governs the timeliness of any civil action maintained under Chapter 13 (*i.e.*, the VHDPA), for the reasons explained at Resp. Br. n.3.

than discovery, recovery would always be limited to acts committed in the three years predating the complaint, and the text of the look-back provision would have no meaning. Petitioners' interpretation "thereby offend[s] the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981).

There is only one way to give meaning to the language in the Willis Bill, S. 2075, and ultimately the VHDPA and to reconcile it with Section 507(b). See *Muscarello v. United States*, 524 U.S. 125, 135 (1998) (interpreting "carry" and explaining interpretation of "the statutory scheme" must "make[] sense"). Infringement claims accrue upon discovery under Section 507(b), but claims under the VHDPA accrue upon infringement—a specific statutory exception that proves the rule.

2. The VHDPA and its predecessors dating back to 1957 are not outliers.

First, there are textual clues within the Copyright Act that point to the same result. For one, Section 504(d), enacted at the same time as the VHDPA, provides enhanced damages for certain infringement of the public performance right found in Section 110(5). 17 U.S.C. 504(d). Section 504(d) strikes a unique balance—it increases the magnitude of damages for one type of infringement but with a cap on the duration, limiting such damages to "the preceding period of up to 3 years." 17 U.S.C. 504(d). Again, if Section 507(b)

already imposed that cap, then Section 504(d) would be surplusage.

Moreover, Section 507(a) of the Copyright Act—which deals with criminal infringement—measures the limitations period from the time the “cause of action *arose*.” (emphasis added). That language embodied an injury-accrual rule. *McMahon v. United States*, 342 U.S. 25-26, 27 (1951) (discussing similar language in the Admiralty Act). Section 507(b), however, measures the limitations from the period “after the claim *accrued*.” (emphasis added). This distinction is meaningful. “[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quotation omitted). If the drafters of Section 507(b) had intended to impose an injury-accrual rule, they simply would have borrowed the language to that effect from Section 507(a). But they did not, and the better interpretation of Section 507(b) is that it embodies a more flexible rule that triggers the statute of limitations based on when the copyright holder knew or should have known it had a claim. *William A. Graham Co.*, 568 F.3d at 434-35.

Second, other statutory provisions of copyright law tell the same story.

A jurisdiction statute, 28 U.S.C. 1498(b), strips the government of sovereign immunity for copyright infringement and establishes exclusive jurisdiction in the Court of Federal Claims for copyright suits against the government. *Zoltek Corp. v. United States*,

672 F.3d 1309, 1319 (Fed. Cir. 2012). Congress added Section 1498(b) in 1960—the prior version of the statute covered only patent claims—and it remains in effect today. See 74 Stat. 855. Section 1498(b) contains the same look-back limitation that Congress considered in the 1957 Willis Bill and eventually enacted in the VHDPA in 1998: “Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action” 28 U.S.C. 1498(b). As with the VHDPA and its predecessors, as well as Section 504(d), Congress’s need to specify a look-back limitation suggests that discovery accrual is the default rule for copyright infringement under Section 507(b).

Although not part of the Copyright Act itself, Section 1498 deals expressly with copyright infringement, and it was enacted in 1960—just a few years after Congress added Section 507(b) to the Copyright Act. The “provisions’ parallel text and purposes counsel in favor of interpreting the two provisions consistently,” *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014), and the only way to reconcile the language of private-party accrual under Section 507(b) and public-party accrual under Section 1498(b) is to interpret Section 507(b)’s limitations period as accruing upon discovery, not injury. See *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (“[C]ourts normally try to read language in different, but related, statutes, so as best to reconcile those statutes[.]”).

While considering various amendments to the Copyright Act in 1976, Congress could have amended Section 507(b) to borrow the text of Section 1498(b) and extend it to all copyright claims, but it chose not to. See H.R. Rep. No. 94-1476, at 164 (1976) (“Section 507 . . . establishes a three-year statute of limitations for both criminal proceedings and civil actions. The language of this section, which was adopted by the act of September 7, 1957 (71 Stat. 633), represents a reconciliation of views, and has therefore been left unaltered.”). Petitioners effectively ask to insert by judicial fiat in Section 507(b) a look-back limitation, but this Court “will not attribute words to Congress that it has not written.” *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 424 (2009). As Section 1498(b) and the history of design-protection statutes show, Congress clearly knew how to enact limitations on recovery for copyright infringement but chose not to do so in Section 507(b).

* * *

These few instances where Congress enacted an express look-back period triggered by the date of infringement all have one thing in common: they grant copyright plaintiffs a special right that previous copyright plaintiffs did not have, but the price for that new right was a narrower ability to recover for infringement of the right.

The 1957 Willis Bill envisioned creating an entirely new category of copyrightable works—protection for original functional designs—but that protection was controversial, and it came with a shorter

term of protection and an express limitation on recovery. Even with those limitations, the design right never passed except in the niche context of boat hulls. Similarly, Section 504(d) enhances damages for one type of infringement but does so in only a limited way, by altering the default in Section 507(b) to restrict the number of years for which the enhanced recovery will be available. Finally, because Section 1498(b) waives sovereign immunity and permits suits against the government that hit the public fisc, Congress imposed a stricter accrual rule that would result in fewer claims and lower damages. In each of these instances, Congress decided to strike a particular balance for a particular purpose. That is a balance it chose not to strike in the default rule under Section 507(b).

B. The Common-Law At The Time Of Section 507(b)'s Enactment Supports A Discovery Accrual Rule

That Congress would have understood Section 507(b) to incorporate a discovery rule—thus needing to specify exceptions elsewhere in copyright infringement law (design protection, enhanced damages, and claims against the government)—is entirely consistent with the common-law at the time of its enactment. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (looking to a “term’s ordinary, contemporary, common meaning . . . when Congress enacted” the provision).

“[W]hen a statute covers an issue previously governed by the common law, we interpret the statute

with the presumption that Congress intended to retain the substance of the common law.” *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010). Before 1957, federal courts applied state statutes of limitations given the absence of any express limitations period in the Copyright Act. And at that time, and certainly before 1957, common-law principles governing limitations periods set accrual triggers on discovery, not on injury.

Many cases applying the discovery-accrual rule are fraud cases, which is unsurprising because fraudulent concealment of a cause of action occurs with some frequency. *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) (recounting history). But by the 1940s, the rule had been extended beyond fraud claims.⁵ *Urie v. Thompson*, 337 U.S. 163 (1949).

Although Petitioners seek to waive away *Urie* as a “latent disease” case, *Urie* did not instruct courts to

⁵ Even Petitioners’ proposed distinction between fraud claims and non-fraud claims is not so simple to apply in practice. Petitioners cite *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) as an example of a fraud case (Pet’r Br. 35–36), but as Judge Friendly recognized years later, *Holmberg* was “an action not founded on fraud”. *Movicolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 84 (2d Cir. 1961) (Friendly, J.). Instead, *Holmberg* applied the discovery rule to the far broader category of “inequitable conduct,” *Holmberg v. Armbrecht*, 150 F.2d 829, 830 (2d Cir. 1945), a rather capacious construct. Many instances of copyright infringement involve what might be called inequitable conduct, including but not limited to situations where an infringer intentionally violates the copyright of another or makes no attempt to clear rights, safe in the knowledge that if he is ever caught then he is no worse off than before. Piracy is nothing if not inequitable.

condition the availability of the discovery rule on the type of injury alleged. To the contrary, the Court invoked “the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.” *Id.* at 170. That is a discovery rule. The Court also described the basis of this “traditional” and “conventional” understanding: if a claim accrues before the plaintiff could have reasonably discovered it, he would have “only a delusive remedy,” and the Court reasoned that it was unlikely Congress “intended such consequences to attach to blameless ignorance.” *Id.* at 169–70. In other words, what mattered was that the disease was latent, not that the latency was due to disease.

If an injury is latent, then the discovery rule applies. Copyright infringement often involves plaintiffs who are understandably unaware of infringement—that is, are “blameless[ly] ignoran[t]”—for some time. As the Seventh Circuit long ago explained, “[t]he fact that a publisher loses sales to a competitor is not in itself a clue to copyright infringement, since there is vigorous competition among copyrighted works. . . . [W]e doubt that every time the sales of a publication dip, the publisher must, to preserve his right to sue for copyright infringement, examine all of his competitors’ publications to make sure none is infringing any of his copyrights.” *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983). The same “traditional purposes of statutes of limitations” which “conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights[.]”

Urie, 337 U.S. at 170, also applies to copyright infringement. Courts applying the discovery rule in Section 507(b) are merely applying the 1957 common-law understanding of accrual; they are not, as Petitioners claim (Pet'r Br. 29) mechanically applying an unreasoned rule of statutory interpretation.

Although Petitioners attempt to characterize the discovery rule as a version of equitable tolling rather than a rule of accrual, that characterization is incorrect. Pet'r Br. 36. To the contrary, *Urie* determined as an equitable matter that the discovery rule was part and parcel of claim "accrual" as the word "accrual" was used in the relevant federal statute. 337 U.S. at 169. *Urie* never mentioned "tolling," and the Court never discussed the notion that the statute of limitations should be "tolled" until the plaintiff discovered his injury. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) ("distinguish[ing] between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations" and explaining "[a]ccrual is . . . not the date on which the wrong that injures the plaintiff occurs, but the date . . . which the plaintiff discovers that he has been injured . . . [t]olling doctrines stop the statute of limitations from running even if the accrual date has passed.") (emphasis in original).

Finally, it is notable that Petitioners' textual argument, even on its own terms, proves too much. Petitioners say that "accrue" unambiguously requires an injury-accrual rule. Pet'r Br. 17-19. If that is so, then applying a discovery-accrual rule in any setting—even

fraud—would be contrary to the plain meaning of “accrue” and would be wrong as a matter of interpretation. But no one supports that position, and it is contrary to centuries of jurisprudence: the Statute of James (the English predecessor to American statutes of limitations) lacked an express exception for fraud actions, see 21 Jac. I. ch. 16, §§ II, VII (1623); nonetheless, English courts applied what we would recognize as a discovery-accrual rule in cases of fraud. See, e.g., *South Sea Co. v. Wymondsell*, (1732) 24 Eng. Rep. 1004, 1005 (Ch.) (observing that “a bill to be relieved against a fraud, was not within the statute of limitations”); *Booth v. Warrington*, (1714) 2 Eng. Rep. 111, 112 (H.L.) (affirming that “the plea of the statute of limitations ought not to avail [the defendant] any thing” in a claim for fraud). Petitioners’ argument boils down to the assertion that the common-law meaning of accrual allowed for the discovery rule in cases of fraud and disease *and no other circumstances*, but there is no support for the proposition that all other types of injuries were ineligible for the discovery rule. To the contrary, *Urie* shows that the “traditional” and “conventional” understanding of statutes of limitations is that a claim “accrues” upon “notice of the invasion of legal rights.” 337 U.S. at 170.

II. The Legislative History Of Section 507(b) Suggests Congress Intended Claims Under The Act To Accrue Upon Discovery

Although the Court need not wade into the legislative history, to the extent it finds such recourse neces-

sary, the legislative history also suggests that Congress intended for courts to apply the above common-law understanding of the discovery rule to Section 507(b). *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (“Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history.”).

First, in crafting a statute of limitations as part of the 1957 proposed amendments to the 1909 Act, the Association of the Bar of the City of New York proposed the following language to Congress:

[P]rovided, that the running of the said period shall be suspended during such time as institution of the action is precluded by the absence of the defendant from the United States, or during such time as the person entitled to the cause of action is under legal disability, or during the interval, not to exceed six months, between the death of either party and the appointment of an executor or administrator, *or at such time as the cause of action is fraudulently concealed by the person liable and is unknown to the person entitled thereto.*

84th Congress, 2d. Session H.R. 2419 (emphasis added). Congress did not include the emphasized language in Section 507(b), of course. But according to this House Report, Congress decided not to include this language because it would be “unnecessary” (*id.* at 4); as the Congressional report states, Congress “decided not to incorporate these suggestions . . . for

the reason that the Federal district courts, generally, would recognize these equitable defenses anyway,” *id.* at 2. Congress thus intended that federal courts would continue to apply traditional equitable principles—like the ones in *Urie*—when determining when a claim “accrues” under Section 507(b).

Second, this House Report elsewhere makes clear that Congress intended that courts should continue applying “equitable considerations,” such as the discovery rule the Court described in *Urie*. *Id.* at 3. As the report explains in discussing Section 507(b), “[e]quitable considerations are available to prolong the time for bringing suit in such cases where there exist the disabilities or insanity of infancy [sic], absence of the defendant from the jurisdiction, fraudulent concealment, etc.” *Id.* at 3. The report does not attempt an exhaustive list of those “equitable considerations,” as the final “etc.” indicates. The partial list does not include latent disease, which even Petitioners concede is an obviously valid basis for applying the discovery rule. Instead, the report envisions that courts will continue to do what they had done for decades: apply common-law equitable principles to the facts of a given case when determining whether the statute of limitations bars the claim, like in *Urie*.⁶

⁶ The House Report’s reference to “equitable considerations” appears to refer to conventional considerations based on fairness that courts had typically been applying. In context, it is highly unlikely that the House Report intended to draw fine distinctions between such equitable considerations and the technical doctrine of equitable tolling.

Congress was wise to refrain from attempting to specify all possible situations that might delay the accrual of an infringement claim. For example, in 1957 the Register of Copyright apparently believed that the “nature of copyright infringement” was such that infringement would be highly public and discovered virtually immediately. S. Rep. No. 85-1014, at 5; 1957 U.S.C.C.A.N. at 1965. But that was in 1957 when television stations and film studios were few, and before the virtually infinite possibilities of infringement online. Congress appropriately allowed courts to apply equitable principles to fit individual cases over time.

Although Petitioners and certain *amici* argue that a discovery rule would be inconsistent with Congress’s desire to create a uniform statute of limitations and to grant repose to copyright defendants, the legislative history does not support that view. To the contrary, Congress clearly expected that courts would continue applying traditional “equitable considerations” when enforcing the statute of limitations, even when inconvenient for alleged infringers. There is no evidence of any widespread, unexpected problems resulting from application of the discovery rule or any other equitable considerations. The nuances of the application of a knew-or-should-have-known standard are inherently fact-specific and do not counsel in favor of this Court’s review.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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