

No. _____

In the Supreme Court of the United States

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC.,
RUTHIE ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,
PETITIONERS

v.

MICHAEL GRECCO PRODUCTIONS, INC.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claim “accrue[s]” under the Copyright Act’s statute of limitations for civil actions, 17 U.S.C. 507(b), when the infringement occurs (the “injury rule”) or when a plaintiff discovers or reasonably should have discovered the infringement (the “discovery rule”).

**PARTIES TO THE PROCEEDING AND CORPORATE
DISCLOSURE STATEMENT**

Petitioners are RAdesign, Inc., Davis by Ruthie Davis, Inc., Ruthie Allyn Davis, Ruthie Davis, Inc., and Does 1–5.

Petitioners RAdesign, Inc., Davis by Ruthie Davis, Inc., and Ruthie Davis, Inc. each have no parent corporation and no publicly held company owns 10% or more of their stock.

Respondent is Michael Grecco Productions, Inc.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Michael Grecco Productions, Inc. v. RAdesign, Inc. et al., No. 21-cv-8381 (Oct. 12, 2021)

United States Court of Appeals (2d Cir.):

Michael Grecco Productions, Inc. v. RAdesign, Inc. et al., No. 23-1078 (June 20, 2023)

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Petitioners RADesign, Inc. et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is published at 112 F.4th 144. The opinion of the district court (App., *infra*, 19a-30a) is published at 678 F. Supp. 3d 405.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2024. App., *infra*, 1a. A timely petition for rehearing was denied on October 17, 2024. *Id.* at 31a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 507(b) of Title 17 of the United States Code provides:

No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

STATEMENT

Last Term, three Justices called for this Court to hear a case “squarely presenting the question whether the Copyright Act authorizes the discovery rule” uniformly applied by the courts of appeals. *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 376 (2024) (Gorsuch, J., dissenting). This is that case. The Court should grant certiorari because this question is no less important than the question in *Warner Chappell* and “[t]here is little reason to suppose the Copyright Act’s provisions ... contemplate any departure from the usual” injury rule. *Id.* at 375.

This Court has “never decided ... whether a copyright claim accrues when a plaintiff discovers or should have discovered an infringement, rather than when that infringement happened.” *Id.* at 371 (majority op.). But the text of the Copyright Act and this Court’s precedents compel the conclusion that a copyright claim accrues upon infringement, not discovery.

The Copyright Act provides that “[n]o civil action shall be maintained ... unless it is commenced within three years after the claim accrued.” 17 U.S.C. 507(b). “Accrue” has a “well-settled meaning: A ‘right accrues when it comes into existence.’” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810 (2024) (citation omitted). As the Court has made clear time and again, the “standard rule [is] that the limitations period

commences when the plaintiff has a complete and present cause of action,” and a discovery rule is permitted only when Congress expressly authorizes it. *Rotkiske v. Klemm*, 589 U.S. 8, 13-14 (2019). Congress has not included a discovery rule in the Copyright Act.

A cause of action under the Copyright Act “accrues” upon infringement. See *Petrella v. MGM, Inc.*, 572 U.S. 663, 670 (2014) (“A copyright claim ... arises or accrue[s] when an infringing act occurs.” (citation omitted)). An action under the Copyright Act must therefore be brought “within three years” of that infringement. 17 U.S.C. 507(b).

The courts of appeals, however, have unanimously adopted an atextual discovery rule, starting the clock when the plaintiff discovers or should have discovered the infringement. These courts offer no good explanation for adopting that rule. Most of the decisions “merely cite other decisions; they pay little attention to the statutory text or the Supreme Court’s precedent.” *Everly v. Everly*, 958 F.3d 442, 461 (6th Cir. 2020) (Murphy, J., concurring). The Court’s intervention thus is needed to jettison this “bad wine of recent vintage.” *Rotkiske*, 589 U.S. at 14 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in the judgment)); see, e.g., *Gabelli v. SEC*, 568 U.S. 442 (2013).

This issue’s importance is well established. The Court granted certiorari in *Warner Chappell* to address the discovery rule’s scope. The question of whether the discovery rule exists in the first place is logically antecedent and, by definition, more important. And the Court’s decision in *Warner Chappell* expanding the scope of damages under the discovery rule heightened the urgency of addressing this threshold issue: If a claim

is timely, then the full scope of copyright damages are available (not just a subset of those damages).

There is no room left for percolation. All of the numbered circuits have adopted the discovery rule. In particular, the Second Circuit has now squarely reaffirmed the discovery rule in the wake of *Warner Chappell*, resolving any uncertainty about how it would reconcile its circuit precedent with that decision. The time for percolation thus has finished and the time is ripe for this Court’s intervention.

This Court has repeatedly granted certiorari in cases without a circuit conflict, in order to resolve important questions of federal statutory interpretation. *E.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 382 (2022); *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020); *Rehaif v. United States*, 588 U.S. 225, 228 (2019). It should do so here as well.

This is an ideal vehicle. The Second Circuit reversed the district court for “actually employ[ing] the injury rule” to dismiss the case as untimely. App., *infra*, 8a. Whether the injury rule is correct is thus squarely presented and outcome determinative. The discovery rule is firmly—and wrongly—entrenched. This Court’s intervention is needed to bring the Copyright Act’s application in line with the text Congress enacted and this Court’s precedent.

A. Background of the Copyright Act

The Copyright Act permits a “legal or beneficial owner of an exclusive right” under copyright law to “institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. 501(b). In 1957, Congress added a statute of limitations to civil actions brought under the Copyright Act. *Petrella*, 572 U.S. at 669. Section 507(b) 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(b).

Before Congress enacted Section 507(b), the states had variable limitations periods ranging “from one to eight years.” *Petrella*, 572 U.S. at 670. By enacting a federal limitations period, Congress intended to “render uniform and certain the time within which copyright claims could be pursued.” *Ibid*.

In *Petrella*, this Court interpreted Section 507(b) to foreclose the equitable defense of laches. *Id.* at 667-70. The Court held that, under Section 507(b), “an infringement is actionable within three years, and only three years, of its occurrence.” *Id.* at 671. In reaching that result, the Court noted the standard rule that a claim “ordinarily accrues ‘when [a] plaintiff has a complete and present cause of action.’” *Id.* at 670 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). Thus, the Court concluded a copyright claim “arises or ‘accrue[s]’ when an infringing act occurs.” *Ibid*. The Court noted that “[a]lthough we have not passed on the question,” many courts of appeals have adopted a “discovery rule” as an “alternative” to the “injury rule.” *Id.* at 670 n.4.

In fact, every numbered court of appeals has adopted a discovery rule. See *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009) (adopting the discovery rule and collecting cases), *cert. denied*, 558 U.S. 991 (2009); *Diversey v. Schmidly*, 738 F.3d 1196, 1200 (10th Cir. 2013) (applying the discovery rule); *Webster v. Dean Guitars*, 955 F.3d 1270, 1274 (11th Cir. 2020) (same); App., *infra*, 7a.

Last term, in *Warner Chappell*, this Court granted certiorari on a subsidiary question: “[w]hether, under

the discovery accrual rule applied by the circuit courts,” a copyright plaintiff “can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.” 601 U.S. at 371. The Court held that the answer was yes, rejecting the three-year damages cap the Second Circuit imposed in *Sohm v. Scholastic Inc.*, 959 F.3d 39, 51-52 (2d Cir. 2020). This Court found that *Sohm* purported to apply the discovery rule but made it “functionally equivalent to [the injury rule]—an accrual rule based on the timing of an infringement.” *Warner Chappell*, 601 U.S. at 373.

The Court declined to pass on the validity of the discovery rule. Instead, it rewrote the question presented to exclude the issue because the petitioner “never challenged the Eleventh Circuit’s use of the discovery rule below.” *Ibid.* The petitioner nonetheless focused its briefing “almost entirely” on the validity of the discovery rule, as did numerous *amici curiae*. *Id.* at 371 n.1.

Three Justices would have dismissed the case as improvidently granted. They emphasized that the Copyright Act “almost certainly does not tolerate a discovery rule.” *Id.* at 374 (Gorsuch, J., dissenting). “[R]ather than devote [the] time” needed to resolve the damages question, those Justices would have dismissed the *Warner Chappell* petition as improvidently granted and “awaited another squarely presenting the question whether the Copyright Act authorizes the discovery rule.” *Id.* at 376 (Gorsuch, J., dissenting).

B. Facts And Procedural History

This case squarely presents the question whether the Copyright Act authorizes the discovery rule. Petitioner Ruthie Davis is an award-winning designer of women’s shoes. Her edgy and stand-out designs are frequently

worn by celebrities, models, and influencers. Davis has earned dozens of accolades and awards throughout her career as a trailblazing designer and lifestyle purveyor. C.A. App. 99. Ruthie Davis, Inc., Davis by Ruthie Davis, Inc., RAdesign, Inc., and Does 1 through 5 are allegedly entities or individuals that do business as or with Ruthie Davis. C.A. App. 9-10.

Respondent Michael Grecco Productions, Inc. (“Grecco”) is a photography studio owned and operated by Michael Grecco. App., *infra*, 3a. Michael Grecco is a prominent photographer and his company is a prolific litigant, having filed over 130 copyright infringement lawsuits at the time this suit was filed. *Id.* at 27a. Grecco spends significant time and money “actively search[ing] for hard to detect infringements” to file lawsuits under the Copyright Act. *Id.* at 3a.

In January 2017, Michael Grecco allegedly photographed the model Amber Rose wearing shoes designed by Ruthie Davis. *Id.* at 3a-4a. Inked Magazine published the photos later that year. *Id.* at 20a.

On August 16, 2017, Davis republished certain photos from Inked on her website and publicly on Twitter, allegedly without a license from Grecco, as illustrated in the following example. C.A. App. 10-12.



On October 12, 2021, Grecco filed a copyright action in the United States District Court for the Southern District of New York. Grecco sued Davis, her alleged companies, and five unidentified alleged infringers based on the August 2017 republications. App., *infra*, 20a. Grecco alleged that he had discovered the infringing activity on February 8, 2021. *Id.* at 22a. Grecco thus filed the complaint more than four years after the alleged infringement, but less than one year after he allegedly discovered the infringement. *Id.* at 22a-23a.

The district court dismissed the complaint as untimely. *Id.* at 17a-30a. The court cited the Second Circuit’s discovery rule. *Id.* at 22a. But noting Grecco’s sophistication and “extensive experience with copyright law and practice,” the court found that the face of the complaint established “the unreasonableness of ... plaintiff’s late discovery.” *Id.* at 20a, 22a, 26a.

The court of appeals vacated and remanded. *Id.* at 1a-16a. The court found that the district court erred because it “actually employed the injury rule.” *Id.* at 8a. The court reaffirmed the discovery rule that applies to all copyright claims in the Second Circuit and made clear that the discovery rule admits no exceptions. *Id.* at 12a-15a.

Davis timely petitioned for rehearing en banc, asking the Second Circuit to reject the discovery rule and adopt the injury rule. C.A. Doc. No. 109. The Second Circuit denied that petition. App., *infra*, 31a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to hold that the Copyright Act adopts the injury rule, not the discovery rule. In a long and growing line of precedent, this Court has rejected courts of appeals’ efforts to impose a discovery rule on statutes where Congress did not include one. The injury rule—not the discovery rule—is the standard rule. Where Congress dictates that a statute of limitations runs from the time a claim “occurs,” “arises,” or (most relevant here) “accrues,” it presumptively imposes an injury rule, not a discovery rule, unless the statute says otherwise.

Applying this Court’s precedent to the Copyright Act is straightforward. Congress requires an infringement claim to be brought “within three years after the claim accrued.” 17 U.S.C. 507(b). “A right accrues when it comes into existence.” *Corner Post*, 603 U.S. at 810. So a copyright claim must be brought within three years after it comes into existence. And a copyright claim comes into existence—it “arises or accrues”—“when an infringing act occurs.” *Petrella*, 572 U.S. at 670. As three Justices recognized just last Term, the Copyright Act “almost certainly does not tolerate a discovery rule.”

Warner Chappell, 601 U.S. at 374 (Gorsuch, J., dissenting). The court of appeals’ judgment is accordingly incorrect.

This important issue warrants review to correct the court of appeals’ entrenched error. Numerous *amici* called for this Court to resolve the issue in *Warner Chappell*—even though it was not presented in that case—because the discovery rule is bad law and even worse policy. The question of the discovery rule’s very existence is only more important than the question of the rule’s scope this Court resolved in *Warner Chappell*. And there is no more room for percolation. The Second Circuit has now refused to reconsider the discovery rule in the wake of *Warner Chappell*, foreclosing the only likely path for a circuit split. This Court’s intervention is thus needed now.

This is a perfect vehicle. The issue is squarely presented and outcome determinative. This case also vividly illustrates the destruction of repose, needless costs, and undue uncertainty imposed by the discovery rule: A small designer is facing potentially crippling litigation costs for social media posts that were entirely public, not concealed, and occurred more than four years before respondent initiated this suit. Under the injury rule, applied by the district court, this case is easily dismissed at the threshold as untimely.

This is the case that three Justices were “await[ing]” in *Warner Chappell*. *Ibid.* A fourth Justice should join them to grant the petition for a writ of certiorari.

I. The Discovery Rule Flouts The Copyright Act’s Text And This Court’s Precedents

1. The Copyright Act’s 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). If a claim “accrue[s]” upon infringement rather than upon its discovery, an injury rule must apply.

The Court’s precedents leave little room for dispute: this language compels an injury rule and does not permit a discovery rule. This Court has long recognized that “a right accrues when it comes into existence,” *United States v. Lindsay*, 346 U.S. 568, 569 (1954), and that “statutes of limitation begin to run when the right of action is complete,” *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874).

Most recently, this Court held in *Corner Post* that the Administrative Procedure Act’s statute of limitations incorporates a standard injury rule when it says “accrues.” 603 U.S. at 808-09. “This traditional rule constitutes a strong background presumption.” *Id.* at 811. “Accrue” has a “well-settled meaning: A ‘right accrues when it comes into existence.’” *Id.* at 810 (citation omitted). That “definition has appeared ‘in dictionaries from the 19th century up until today.’” *Ibid.* (citation omitted); see, e.g., Webster’s New International Dictionary (2d ed. 1950) (“accrue” means “to come into existence as an enforceable claim: to vest as a right”); Oxford English Dictionary (1933) (similar).¹ Thus, the Court concluded, “a cause of action accrues ‘on [the] date that damage is sustained.’” *Corner Post*, 603 U.S. at 810 (citation omitted).

¹ Contemporaneous legal dictionaries are no different. See, e.g., Black’s Law Dictionary 37 (4th ed. 1957) (“A cause of action ‘accrues’ when a suit may be maintained thereon.”); Stroud’s Judicial Dictionary 32 (3d ed. 1952) (A cause of action “‘accrues’ when it becomes effective, *i.e.*, when the resulting damage manifests itself.”); see also Bouvier’s Law Dictionary 34 (Baldwin’s Century ed. 1948) (similar); Ballentine’s Law Dictionary 15-16 (2d ed. 1948) (similar).

Corner Post's interpretation of "accrue" is in lockstep with a long line of cases where this Court has rejected discovery rules for statutes written like the Copyright Act. In *Gabelli v. SEC*, this Court rejected a discovery rule for the Investment Advisers Act, which requires actions to be "commenced within five years from the date when the claim first accrued." 568 U.S. at 445, 447-48. The Court held that "the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action,'" and courts cannot "graft a discovery rule" onto a statute where its text does not provide for one. *Id.* at 448, 454 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

In *Rotkiske v. Klemm*, the Court rejected a discovery rule for the Fair Debt Collection Practices Act, which requires actions to be "brought 'within one year from the date on which the violation occurs.'" 589 U.S. at 9 (quoting 15 U.S.C. 1692k(d)). The Court criticized an "expansive approach to the discovery rule [a]s a 'bad wine of recent vintage'" that violates "a fundamental principle of statutory interpretation." *Id.* at 14 (quoting *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment)).

And in *TRW Inc. v. Andrews*, the Court rejected a discovery rule for the Fair Credit Reporting Act, which requires actions to "be brought 'within two years from the date on which the liability arises.'" 534 U.S. at 22 (quoting 15 U.S.C. 1681p). "[T]he liability [at issue] arose when the violations occurred, and the limitations period therefore began to run at that point." *Id.* at 35.

This Court has accordingly recognized that the injury rule is the "standard rule" and applies absent an express discovery rule in the statutory text. *Rotkiske*, 589 U.S. at 13. "If there are two plausible constructions

of a statute of limitations, we generally adopt the construction that starts the time limit running when the cause of action ... accrues." *Ibid.* (quotation marks and citation omitted); see also *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 336 (2017) (applying the standard injury rule to the Patent Act); *Wallace*, 549 U.S. at 388 (Section 1983); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 411 (2005) (False Claims Act); *Franconia Assocs. v. United States*, 536 U.S. 129, 132 (2002) (Tucker Act).

This Court further emphasized that "[a] textual judicial supplementation" to overlay a discovery rule "is particularly inappropriate" because "Congress has enacted statutes that expressly include the language ... setting limitations periods to run from the date on which the violation occurs *or the date of discovery of such violation.*" *Rotkiske*, 589 U.S. at 14 (emphasis added); see also *ibid.* (collecting examples).

These precedents establish that the Copyright Act adopts the standard injury rule. The Act's statute of limitations begins to run when "the claim accrued." 17 U.S.C. 507(b). As in *Corner Post* and *Gabelli*, "[a] 'right accrues when it comes into existence,'" *Corner Post*, 603 U.S. at 810, that is, "when the plaintiff has a complete and present cause of action," *Gabelli*, 568 U.S. at 448. For a copyright claim, this is at the time of infringement, because "[a] copyright claim ... arises or 'accrue[s]' when an infringing act occurs." *Petrella*, 572 U.S. at 670. Specifically, "[t]o establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel.*

Serv. Co., 499 U.S. 340, 361 (1991). Neither element depends on discovery by the owner. It is thus at the time of the infringing copying—not the owner’s discovery of that copying—that liability first arises.

Nothing in the Copyright Act indicates that Congress departed from the standard injury rule. The Act’s text does not “expressly include” language adopting a discovery rule—language Congress has adopted elsewhere. *Rotkiske*, 589 U.S. at 14 (collecting examples); see, e.g., 12 U.S.C. 3416 (“An action to enforce any provision of this chapter may be brought ... within three years from the date on which the violation occurs *or the date of discovery of such violation*, whichever is later.” (emphasis added)). Nor does the Copyright Act inherently involve fraud or concealment. See *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347-48 (1874) (“In suits in equity where relief is sought on the ground of fraud, ... the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.”). While equitable tolling might apply in certain individual copyright cases, nothing in history or equity supports grafting a categorical discovery rule onto the Copyright Act.

This Court all but recognized as much in *Petrella* when it concluded that a copyright “infringement is actionable within three years, and only three years, of its occurrence.” 572 U.S. at 670-71. And three Justices in *Warner Chappell* concluded that “[t]here is little reason to suppose the Copyright Act’s provisions at issue ... contemplate any departure from the usual rules.” 601 U.S. at 375 (Gorsuch, J., dissenting).

2. The courts of appeals have offered no sound basis for reaching a contrary rule. As Judge Murphy has observed, “most of these decisions merely cite other decisions; they pay little attention to the statutory text or

the Supreme Court’s precedent.” *Everly*, 958 F.3d at 461 (Murphy, J., concurring).

In an “oft-cited example” of the snowballing effect of merely relying on other courts’ decisions, “the Ninth Circuit adopted the discovery rule in an unreasoned sentence, relying on a district-court decision addressing the use of fraudulent concealment to toll a statute of limitations.” *Id.* at 461-62 (Murphy, J., concurring) (citing *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994)). Similarly, in *Martinelli v. Hearst Newspapers, L.L.C.*, the Fifth Circuit cited circuit precedent that “did not explain why the discovery rule applied.” 65 F.4th 231, 236 (5th Cir. 2023), cert. denied, 144 S. Ct. 2561 (2024). The Fourth and Sixth Circuits also adopted the discovery rule without serious analysis, only citation to other courts of appeals. See *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997). Other courts have engaged in no analysis at all. See *Santa-Rosa v. Combo Recs.*, 471 F.3d 224, 227 (1st Cir. 2006).

Some courts of appeals invoked a default rule that “the discovery rule applies ‘in the absence of a contrary directive from Congress.’” *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007) (citation omitted); see also *Webster*, 955 F.3d at 1276 (similar); *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1015-16 (10th Cir. 2013) (similar); *Taylor v. Meirick*, 712 F.2d 1112, 1117-18 (7th Cir. 1983) (similar). But that is flat wrong. This Court squarely rejected that premise in *Rotkiske*. See 589 U.S. at 13.

Some courts of appeals combine the two errors, relying on circuit precedent that itself rests on that since-

abrogated premise. For example, in reaffirming the discovery rule below, the Second Circuit relied on circuit precedent applying the discovery rule to a copyright ownership dispute. See App., *infra*, 7a (citing *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992)). *Stone*, however, merely relied on prior circuit precedent that a claim under 42 U.S.C. 1983 “accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised.” 970 F.2d at 1048 (citing *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987), cert denied, 483 U.S. 1021). This Court, however, has since abrogated *Cullen* by reaching the opposite result: the “accrual date of a § 1983 cause of action” begins when a plaintiff has a complete and present cause of action. *Wallace*, 549 U.S. at 388. And again, this Court has rejected the broader premise that the discovery rule is the default for when a claim “accrues.” So *Stone* is anything but a solid foundation.²

One court also reasoned by distinction from Section 507(a), which provides that the statute of limitations for criminal actions begins to run “after the cause of action arose,” rather than “after the claim accrued.” See *Haughey*, 568 F.3d at 434-37. But this Court’s precedents foreclose that reasoning as well: “arise” and “accrue” both demand an injury rule because “arise” and “accrue” mean the same thing. See *TRW*, 534 U.S. at 22 (“arises”); *Gabelli*, 568 U.S. 442 (“accrued”); *Petrella*, 572 U.S. at 670-71 (“accrued”); *St. Louis & S. F. R. Co.*

² The Ninth Circuit has similarly relied on abrogated precedent. See *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (failing to mention that *TRW* reversed the Ninth’s Circuit’s discovery rule for the Fair Credit Reporting Act).

v. *Spiller*, 274 U.S. 304, 313 (1927) (“[A]rise’ was used in the decree as the equivalent of ‘accrue.’”).

The driving force behind the discovery rule appears to be policy. Some courts admit as much expressly. See, e.g., *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124-25 (2d Cir. 2014) (“Policy considerations also counsel in favor of the discovery rule in this context.”); *Polar Bear*, 384 F.3d at 706 (“Such a harsh rule would distort the tenor of the statute.”).

This Court’s precedents foreclose that reasoning, too. It is not the role of courts to “second-guess Congress’ decision” to include either an injury rule or a discovery rule; such decisions “reflect[] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.” *Rotkiske*, 589 U.S. at 14-15 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

Even if policy were relevant, the injury rule adopts sound policy. The injury rule “advanc[es] ‘the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.’” *Gabelli*, 568 U.S. at 448 (citation omitted).

By contrast, the discovery rule undermines those policies, preventing repose and causing wasteful and costly litigation. Stale claims are especially harmful because of copyright law’s strict liability, *Shapiro v. H. L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963), and statutory damages, 17 U.S.C. 504. Because copyright liability can be harsh, the discovery rule leads to uncertainty for countless individuals and small businesses. As this case illustrates, anyone who has reposted something on so-

cial media is at risk essentially forever. That dramatically undermines the fundamental need for repose that Congress recognized in adopting a limitations period in the first place.

Notably, the discovery rule is unnecessary to avoid unfairness. Even when the injury rule applies, equitable tolling can address fairness concerns in a far more targeted manner, permitting claims where there is fraud or concealment in individual cases. See *Rotkiske*, 589 U.S. at 15 (reserving a similar question). Given the availability of equitable tolling, a default discovery rule is effectively a judge-made policy of *inequitable* tolling, extending the limitations period and denying repose in cases in which equitable tolling would *not* apply. Judicially-created conceptions of policy provide no sound basis for adopting that rule.

The leading treatise on copyright law describes the situation bluntly: “To date, all Courts of Appeals have adopted the discovery rule, leaving only *logic* in support of the injury rule.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05 (2024). This Court should join the side of logic and ensure that courts enforce the Copyright Act as written.

II. The Question Presented Warrants This Court’s Review

As Justice Barrett pointed out at oral argument in *Warner Chappell*, by reserving the question of whether the discovery rule is correct in the first place, this Court is free to revisit that question if the Court determines “there’s an error that we want to correct.” *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), Tr. 54. As set forth above, there is such an error and this Court should correct it.

The importance of the question presented is clear. The Court has repeatedly granted review to decide whether the injury or discovery rule applies to claims under important federal statutes. And for good reason, as a court-imposed discovery rule can vastly expand potential liability beyond the bounds Congress authorized. The Copyright Act deserves no less attention. This issue has a substantial and recurring impact on individuals and businesses around the country. See 6 William F. Patry, *Patry on Copyright* § 20:19 (2024) (collecting cases).

In *Warner Chappell*, this Court granted certiorari to address “only whether a plaintiff with a timely claim under the [discovery] rule can get damages going back more than three years.” 601 U.S. at 371. If that question was sufficiently important to merit certiorari, it follows *a fortiori* that the question presented here—whether the discovery rule exists at all—is sufficiently important as well. See *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), Tr. 44-45 (JUSTICE ALITO: “[H]ow can a question about the scope of the discovery rule be cert worthy and yet ... the question of the existence ... of the discovery rule, not be cert worthy?”).

Reflecting the issue’s importance, a raft of diverse interests lined up against the discovery rule in *Warner Chappell*. For example, the Chamber of Commerce “urge[d] the Court to provide much-needed guidance on the limitations period for copyright claims” and “hold that an injury rule, not a discovery rule, applies.” Amicus Br. of the Chamber of Commerce on Writ of Certiorari, *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), at 1-2. The Association of American Publishers was on the same page: “Application of the discovery rule along with an indefinite period for retroactive damages presents a

significant concern for AAP’s members.” Amicus Br. of the Ass’n of Am. Publishers, *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), at 4 (capitalization removed). The Recording Industry Association of America was singing the same tune. Amicus Br. of the Recording Indus. Ass’n of Am., *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), at 13-16. As these and other industry participants recognize, a copyright discovery rule “would throw gasoline on the fire of copyright trolling, encouraging nuisance lawsuits and money demands over ancient conduct of little financial significance to either party,” with no corresponding social benefit. Amicus Br. of the Elec. Frontier Found., *Warner Chappell*, No. 22-1078 (Dec. 4, 2023), at 13.

Commentators recognize that this question still needs to be answered. As one commentator put it, *Warner Chappell* “sidestep[ped] this large elephant in the room” and “leaves a major question open for a future case.” Lauren Schweitzer, *High Court Copyright Decision Leaves Big Question for Another Day*, Bloomberg Law (May 17, 2024).³ Per another, *Warner Chappell* “leaves lower courts in limbo: the discovery rule in copyright has been clarified (and not rejected), but a cloud hangs over its validity even though it remains the law in most circuits.” Zvi Rosen, *Warner Chappell Music v. Nealy: Clarity on Damages, Still Hazy on the Discovery Rule*, FedSoc Blog (May 29, 2024).⁴ And, from a 2024 law review article: “While the Supreme Court’s ruling in *Warner Chappell* finally settled the circuit split, it still

³ <https://news.bloomberglaw.com/us-law-week/high-court-copyright-decision-leaves-big-question-for-another-day>.

⁴ <https://fedsoc.org/commentary/fedsoc-blog/warner-chappell-music-v-nealy-clarity-on-damages-still-hazy-on-the-discovery-rule>.

leaves one major question unanswered.” Caroline Gallo, *Damage(s) Control: An Examination of How the Supreme Court Still Has Not Decided if the Discovery Rule or the Injury Rule Applies to Copyright Infringement Damages*, 9 U. Cin. Intell. Prop. & Comput. L.J. 193, 215 (2024).

That major question warrants this Court’s review without a circuit split. The Second Circuit refused to reconsider its discovery rule precedent despite this Court’s recent and repeated cautions in *Corner Post*, *Warner Chappell*, and elsewhere against “[a]textual judicial supplementation” of a discovery rule. *Rotkiske*, 589 U.S. at 14.

This Court granted certiorari to resolve the analogous issue in *Gabelli*—and unanimously rejected the Second Circuit’s atextual discovery rule—over the Solicitor General’s protest that “the decision below does not conflict with any decision of another court of appeals.” Br. in Opp. 18, No. 11-1274 (July 25, 2012). This Court has also repeatedly granted certiorari in recent years to resolve pure questions of statutory interpretation without a circuit split. *E.g.*, *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 174 (2023); *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023); *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 482 (2023); *Shinn*, 596 U.S. at 382; *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass’n*, 594 U.S. 382, 388 (2021); *Tanzin*, 592 U.S. at 46; *Rehaif*, 588 U.S. at 228. It should do the same here.

In particular, this is a court-made error that warrants resolution by this Court, not Congress. “Congress is generally unaware of circuit-level statutory interpretations.” Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 331 (2005). And, even if Congress were aware, it could

hardly enact clearer language than Section 507(b)'s current text: The time when a claim "accrues" has meant the same thing for more than a century.

Notably, requiring Congress to clarify the meaning of "accrue" could inject uncertainty into this Court's otherwise clear precedent regarding the meaning of that term. Congress could not amend the Copyright Act's "accrue" language to adopt an injury rule without destabilizing this Court's decisions in *Gabelli* and *Corner Post* (which interpreted identical language), and *Rotkiske* and *TRW* (which interpreted similar language). It is only if Congress wanted a *discovery rule* that more or different statutory text would be needed. See, e.g., 12 U.S.C. 3416 ("An action to enforce any provision of this chapter may be brought ... within three years from the date on which the violation occurs *or the date of discovery of such violation, whichever is later.*" (emphasis added)). This Court, however, can eliminate any inconsistency simply by granting certiorari and adopting the injury rule.

III. This Case Is An Ideal Vehicle

This case is a perfect vehicle for establishing that Section 507(b) incorporates the standard injury rule, and it well illustrates the waste and mischief that the court of appeals' discovery rule wreaks.

The question is purely legal, squarely presented, and outcome determinative. The Second Circuit vacated and remanded because the district court "actually employed the injury rule" when it dismissed the case. App., *infra*, 8a. In doing so, the Second Circuit strongly reaffirmed its own discovery rule, no matter the equitable circumstances, and rejected the legally correct injury rule. *Ibid.*

It is uncontested that Grecco filed a complaint more than four years after the date of the alleged infringement, but less than one year after the alleged discovery of the infringement. *Id.* at 4a, 22a-23a. Grecco does not allege any fraud or concealment. C.A. App. 12. To the contrary, the complaint alleges that the copying was entirely open and public, on public websites and social media posts. C.A. App. 10-11. If the injury rule applies, this suit is over. See, e.g., *Gabelli*, 568 U.S. at 446 (granting certiorari and reversing where the district court dismissed the complaint as untimely and the court of appeals reversed); *TRW*, 534 U.S. at 26 (similar).

Unlike in *Warner Chappell*, petitioners properly preserved and cleanly present this issue. The district court “actually employed the injury rule.” App., *infra*, 8a. Davis defended the district court’s decision on appeal. *Id.* at 6a-8a. Finally, when the Second Circuit reaffirmed the discovery rule and held that the district court erred by actually applying the injury rule, Davis petitioned for rehearing en banc, asking the Second Circuit to overturn the discovery rule. See *id.* at 31a. The Second Circuit denied that petition. The propriety of the discovery rule is thus fully preserved for this Court’s review.

Notably, the Second Circuit denied review and retained the discovery rule *after* the Court in *Warner Chappell* rejected the Second Circuit’s discovery-rule damages bar—and after three Justices questioned the discovery rule’s very existence. While there may have been reason to await percolation after *Warner Chappell*, to see how the Second Circuit would respond to this

Court overruling its decision in *Sohm*, *supra*, at 51-52,⁵ we now know that the Second Circuit is committed to its atextual discovery rule. As the only court of appeals which had curtailed the discovery rule, the Second Circuit was the last hope. Now, there is no more basis for percolation; the discovery rule is fully entrenched.

Finally, this case perfectly illustrates the harm stemming from the discovery rule. Under the injury rule, this case is easy: Davis won at the threshold in a motion to dismiss. Under the discovery rule, by contrast, Davis must engage in extensive discovery—including into Grecco’s own alleged discovery of the infringement and whether late discovery was reasonable under the circumstances—merely to reach the question of whether the claims are timely. And if material fact disputes remain as to the application of the discovery rule, then the timeliness question would need to be tried. Those discovery costs alone, however, can make defending stale claims cost-prohibitive.

This is exactly the kind of uncertainty and denial of repose the injury rule is supposed to prevent. Congress enacted the injury rule to “render uniform and certain the time within which copyright claims could be pursued.” *Petrella*, 572 U.S. at 670. Under the discovery rule, however, the time in which copyright claims can be pursued is both disuniform (because it will vary from case to case) and uncertain (because the outcome depends on the circumstances of discovery by the individual plaintiff, which is impossible for the defendant to predict).

⁵ See, e.g., Reply Br. at 2, *Hearst Newspapers L.L.C. v. Martinelli*, No. 23-474 (Nov. 6, 2024) (asking the Court to refrain from granting certiorari on this issue pending *Warner Chappell*).

Moreover, Grecco, like other sophisticated copyright plaintiffs, has used the discovery rule to maintain a stale lawsuit even when the infringement was entirely public and there is no allegation of fraud or concealment. Copyright plaintiffs (and trolls, too) across the country can take comfort in their ability to rely on a discovery rule to assert stale claims and force costly litigation or settlement. This court can put a stop to it and end this case, and other stale cases like it, at the outset. That is what the text of the statute, this Court's precedents, history, and logic demand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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JANUARY 2025

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

AUGUST TERM 2023
ARGUED: FEBRUARY 22, 2024
DECIDED: AUGUST 16, 2024

DOCKET NO. 23-1078

MICHAEL GRECCO PRODUCTIONS,
Plaintiff-Appellant,

v.

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC., RUTHIE
ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,
Defendants-Appellees.

Before: WESLEY, CHIN, and LEE, *Circuit Judges.*

WESLEY, *Circuit Judge:*

This appeal concerns the discovery rule and a statute-of-limitations defense in a copyright case where the plaintiff copyright holder is allegedly “sophisticated” in detecting and litigating infringements. Plaintiff-Appellant Michael Grecco Productions, Inc. (“MGP”) alleged that Defendants-Appellees Ruthie Allyn Davis and associated entities and persons (collectively, “Ruthie Davis”) used, without license, Michael Grecco’s copyrighted photos in connection with their designer shoe business.

More than four years after Davis's alleged use began, but less than a year after MGP's alleged discovery of the use, MGP filed its copyright infringement complaint.

The district court dismissed the complaint as barred by the Copyright Act's three-year limitations period, reasoning that "sophisticated" copyright infringement plaintiffs cannot benefit from the discovery rule. In essence, the district court imposed an injury-based date of accrual to copyright infringement claims, and viewed the discovery rule as an exception not available to a sophisticated plaintiff. The district court then concluded that because MGP's complaint touted MGP's "sophistication" in discovering and litigating infringements, it was clear from the complaint that MGP should have discovered Ruthie Davis's alleged infringement within three years of when it began.

We disagree. First, the discovery rule determines when an infringement claim accrues under the Copyright Act, regardless of a copyright holder's "sophistication" in detecting and litigating infringements. Second, a copyright holder's *general* diligence or allegations of diligence in seeking out and litigating infringements, alone, are insufficient to make it clear that the holder's *particular* claims in any given case should have been discovered more than three years before the action's commencement. There is no "sophisticated plaintiff" exception to the discovery rule, or to a defendant's burden to plead and prove a statute-of limitations defense.

Applying our well-established discovery rule and pleading standards, it was not clear from the face of the complaint, or matters of judicial notice, that MGP's claims were barred by the statute of limitations as a matter of law. We therefore vacate and remand.

BACKGROUND

MGP is a photography studio and business owned by Michael Grecco, a commercial photographer. He also presents himself as an industry leader in copyright registration and enforcement, and did so in this case as well. MGP’s complaint described Grecco’s “efforts to educate photographers concerning the benefits of copyright registration,” as well as his view that, in the age of the internet, copyright infringement endangers “the economic viability of photography.” App’x at 8–9 (Compl. ¶¶ 10–11). The complaint also detailed how Grecco promoted “his system of routine copyright registration procedures,” teaching workshops and addressing conferences, and insisted that, “in keeping with his advice to the profession,” Grecco himself “spends time and money to actively search for hard-to-detect infringements, and he enforces his rights under the Copyright Act.” *Id.*

Court records independently confirm Grecco’s efforts.¹ Since 2010, Grecco and MGP have filed numerous cases seeking to enforce copyrights. App’x at 51–97.²

This case arose out of Grecco’s January 2017 photos of model Amber Rose—wearing shoes designed by

¹ On a motion to dismiss, a court may consider extrinsic materials if they are integral to the complaint or “an appropriate subject for judicial notice.” *Glob. Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006). “A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Id.* at 157 (citation omitted).

² As referenced, the Appendix provides a list of more than one hundred copyright suits brought by MGP or Grecco. *See* App’x at 51–97. We note, however, that the list appears to also include cases not brought by MGP or Grecco, and some that are not copyright related. *See, e.g., id.* at 63, 65, 69, 70, 93–94.

Ruthie Davis in the photos.³ According to MGP, a magazine published Grecco’s photos of Rose in August 2017. MGP claimed that Davis republished, without license, at least two of the Rose photos on her brand’s website and a social media platform.

MGP alleged that Davis’s use of the photos began “on August 16, 2017 and continued thereafter.” App’x at 12 (Compl. ¶ 30). MGP further alleged that it “discovered the infringement on February 8, 2021.” *Id.* (Compl. ¶ 31). On October 12, 2021—more than four years after Davis’s infringement allegedly began, but less than a year after MGP’s alleged discovery—MGP filed its complaint against Davis, claiming copyright infringement under the Copyright Act, 17 U.S.C. § 501.

Davis moved to dismiss the complaint as barred by the Copyright Act’s three-year limitations provision. The district court granted the motion, agreeing that MGP’s complaint was time-barred. The district court first observed that, under our precedent, the discovery rule determines when copyright infringement claims accrue. Purporting to apply the discovery rule, the district court stated that MGP “must have been unable, with the exercise of due diligence, to discover the infringing activity prior to August 16, 2020, three years after the infringing activity allegedly began.” *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 678 F. Supp. 3d 405, 408 (S.D.N.Y. 2023) (internal quotation marks omitted).

Next, the district court concluded that MGP’s “relative sophistication as an experienced litigator in identifying and bringing causes of action for unauthorized uses of Grecco’s copyrighted works leads to the conclusion that it should have discovered, with the exercise of

³ MGP alleged that it registered its copyright in the photos in February 2019.

due diligence,” Davis’s alleged infringement “within the three-year limitations period.” *Id.* at 409.

The district court relied on *Minden Pictures, Inc. v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461 (S.D.N.Y. 2019) (“*Minden*”), and its decisions in *Lixenberg v. Complex Media, Inc.*, No. 22-CA-354 (RA), 2023 WL 144663 (S.D.N.Y. Jan. 10, 2023), and *Minden Pictures, Inc. v. Complex Media, Inc.*, No. 22-CV-4069 (RA), 2023 WL 2648027 (S.D.N.Y. Mar. 27, 2023), for the premise “that the relative sophistication of the plaintiffs left them unable to rely on the discovery rule to resurrect time-barred copyright infringement claims.” *Id.* In those cases, the sophisticated plaintiff’s “late discovery” was deemed “unreasonabl[e]” or “implausible.” *Id.* at 410. The district court acknowledged, however, that other judges in the district had “not uniformly accepted the rationale applied by the *Minden* line, and the Second Circuit has not yet weighed in either way.” *Id.* at 409–10 (citing *Parisienne v. Scripps Media, Inc.*, 19 Civ. 8612 (ER), 2021 WL 3668084, at *4 (S.D.N.Y. Aug. 17, 2021); *Hirsch v. Rehs Galleries, Inc.*, 18-CV-11864 (VSB), 2020 WL 917213, at *5 (S.D.N.Y. Feb. 26, 2020)).

Nevertheless, the district court concluded that, because MGP’s complaint “itself alleged” MGP’s so-called sophistication, it was “clear from the face of the complaint” that MGP’s claims were barred by the statute of limitations as a matter of law. *Id.* at 410–11 (citation omitted).

The district court offered MGP the opportunity to amend the complaint “to allege a separately occurring act of distribution or publication” of the Rose photos that “would bring a copyright infringement claim within the three-year limitations period.” *Id.* at 412. After MGP declined to amend, explaining that it would stand on the

allegations of the original complaint, the district court dismissed the case.

This appeal ensued.

DISCUSSION

“The lapse of a limitations period is an affirmative defense that a defendant must plead and prove.” *Staeher v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008) (citing Fed. R. Civ. P. 8(c)(1)). “However, a defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint.” *Id.* Of course, affirmative defenses, like the statute of limitations, “often require[] consideration of facts outside of the complaint and thus [are] inappropriate to resolve on a motion to dismiss.” *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013). Dismissal under Rule 12(b)(6) is therefore appropriate only if “it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff’s claims are barred as a matter of law.” *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015) (internal quotation marks and citation omitted).

We review a district court’s grant of a motion to dismiss “*de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff.” *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 298 (2d Cir. 2022) (internal quotation marks and citation omitted). “The application of a statute of limitations presents a legal issue and is also reviewed *de novo*.” *Horror Inc. v. Miller*, 15 F.4th 232, 241 (2d Cir. 2021) (citation omitted).

The district court erred when it concluded that MGP’s complaint was barred by the Copyright Act’s three-year limitations provision as a matter of law. We therefore vacate and remand.

The Copyright Act provides that “[n]o civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). As to when “the claim accrued,” this Court has previously considered which rule of accrual Congress intended to employ: the injury rule—the claim accrues when an injury (*e.g.*, an infringement) occurs; or the discovery rule—the claim accrues when a diligent plaintiff discovers or should have discovered the injury (*e.g.*, an infringement). See *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124–25 (2d Cir. 2014); see also *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996); *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992). We held “that the text and structure of the Copyright Act . . . evince Congress’s intent to employ the discovery rule, not the injury rule.” *Psihoyos*, 748 F.3d at 124. Ten other circuits concur.⁴

Consequently, “an infringement claim does not ‘accrue’ until the copyright holder discovers, or with due diligence should have discovered, the infringement.” *Id.* (emphasis added). A “diligent plaintiff” is able “to raise claims about even very old infringements if he discovered them within the prior three years.” *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1138 (2024)

⁴ See *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020); *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019); *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 393 (5th Cir. 2014); *Diversey v. Schmidly*, 738 F.3d 1196, 1200–01 (10th Cir. 2013); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009); *Comcast of Illinois X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC*, 477 F.3d 383, 390 (6th Cir. 2007); *Santa-Rosa v. Combo Recs.*, 471 F.3d 224, 227–28 (1st Cir. 2006); *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796–97 (4th Cir. 2001).

(assuming without resolving that the discovery rule governs accrual of copyright infringement claims).⁵

Here, the district court correctly identified our precedent that the discovery rule governs the accrual of copyright infringement claims, but erred in its application.

At the outset, the district court miscalculated the appropriate three-year limitations period. MGP filed its complaint on October 12, 2021. Thus, to be timely, MGP must have been unable, with the exercise of due diligence, to discover the infringing activity prior to October 12, 2018, three years *before the complaint was filed*. See *Psihoyos*, 748 F.3d at 124–25; *see also* 17 U.S.C. § 507(b) (civil action under the Copyright Act must be “commenced within three years after the claim accrued”). By contrast, the district court held that MGP “must have been unable, with the exercise of due diligence, to discover the infringing activity prior to August 16, 2020, three years *after the infringing activity allegedly began*.” *Michael Grecco Prods.*, 678 F. Supp. 3d at 408 (internal quotation marks omitted; emphasis added).

Although the district court claimed to apply the discovery rule, its calculation actually employed the injury rule; it started the three-year clock when the infringe-

⁵ Ruthie Davis suggests that the Supreme Court has cast doubt on applying the discovery rule to determine when a copyright infringement claim accrues. However, the Supreme Court has “never decided whether . . . a copyright claim accrues when a plaintiff discovers or should have discovered an infringement, rather than when the infringement happened.” *Warner Chappell*, 144 S. Ct. at 1139. The Supreme Court has recognized that “[t]he overwhelming majority of courts use discovery accrual in copyright cases,” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 n.4 (2014) (citation omitted), including “many Courts of Appeals . . . (11 at last count),” *Warner Chappell*, 144 S. Ct. at 1139.

ment allegedly began, while also implying that some extension of time might be available if MGP was unable to discover the infringement within those three years. In essence, the calculation incorrectly reflected the discovery rule as an equitable extension and not the rule of accrual.⁶

In the context of the Copyright Act’s three-year limitations provision, the discovery rule is the rule of accrual, not an equitable tolling or estoppel doctrine. The discovery rule is not an exception to the injury rule that only applies to some infringement claims; it is not a benefit for which only some plaintiffs qualify. Rather, “the discovery rule, *not the injury rule*” determines, in the first place, when a copyright infringement claim accrues. *Psihoyos*, 748 F.3d at 124 (emphasis added).

Moreover, as the rule of accrual, the discovery rule does not require a plaintiff to discover his claim within the statutory duration following the offending conduct. That would just be another way of describing the injury rule. Under the discovery rule, a plaintiff has the length of time it takes, using due diligence, to discover the infringement; only from that point does the statute of limitations begin to run. *See id.* at 124–25.⁷

⁶ The discovery rule, as a rule of accrual, is “sometimes confused with the concept of fraudulent concealment of a cause of action,” an equitable tolling or estoppel doctrine. *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). But even this confusion would not explain the district court’s error here. In either case—whether applying the discovery rule or the fraudulent concealment doctrine—the plaintiff has the full limitations period to file an action after the earlier of when he discovered or should have discovered his cause of action. *See id.* at 82; *Psihoyos*, 748 F.3d at 124.

⁷ Of course, the fact that the discovery rule is the rule of accrual does not prevent plaintiffs from additionally invoking, if appropriate, equitable tolling doctrines. *See Petrella*, 572 U.S. at 681.

Setting its initial miscalculation aside, the district court compounded its error by making explicit its view that the discovery rule applies to copyright infringement claims brought by some plaintiffs but not others. It observed that other district court decisions had reasoned that “the relative sophistication of the plaintiffs left them *unable to rely* on the discovery rule to resurrect time-barred copyright infringement claims.” *Michael Grecco Prods.*, 678 F. Supp. 3d at 409 (citing *Lixenberg*, 2023 WL 144663, at *3; *Complex Media*, 2023 WL 2648027, at *3) (emphasis added); *see also Minden*, 390 F. Supp. 3d at 467. The district court then applied the same rationale here, concluding that MGP’s “relative sophistication as an experienced litigator in identifying and bringing” copyright infringement claims rendered it ineligible for the “benefit of the so-called discovery rule.” *See Michael Grecco Prods.*, 678 F. Supp. 3d at 408, 409.

This “sophisticated plaintiff” rationale has no mooring to our cases. First, to the extent this rationale arose out of treating the discovery rule as an equitable doctrine for which only some plaintiffs in some circumstances will qualify, it is wrong. As already noted, because we have previously determined that the discovery rule is Congress’s intended rule of accrual for civil actions under the Copyright Act, it is the rule in every such action and not an equitable exception to the injury rule. *Psihoyos*, 748 F.3d at 124.

Second, to the extent the district court’s rationale recognizes the discovery rule as one of accrual, but nevertheless suggests different rules of accrual for different plaintiffs—the discovery rule for copyright holders *not* sophisticated in detecting and litigating infringements, but the injury rule for copyright holders who *are*—it also is wrong. We have never understood the Copyright Act

to employ different rules of accrual for different plaintiffs. The Supreme Court has made clear that the Act’s “clock is a singular one.” *Warner Chappell*, 144 S. Ct. at 1139, 1140 (holding that “[t]he Copyright Act contains no separate time-based limit on monetary recovery”). For civil actions, the Act establishes one limitations period and employs one rule of accrual. *See* 17 U.S.C. § 507(b). In this Circuit, based on this Court’s understanding of the “text and structure of the Copyright Act,” that is “the discovery rule, not the injury rule.” *Psichoyos*, 748 F.3d at 124.

Third, even if the district court’s “sophisticated plaintiff” rationale is merely a presumption that sophisticated plaintiffs can discover infringements immediately or nearly so, such that the date of earliest diligent discovery would *always* be the date of injury (or approximately so), the rationale remains flawed. A plaintiff’s “sophisticated” nature does not automatically relieve a defendant of her burden to plead and prove a Copyright Act limitations defense. The date on which a copyright holder, with the exercise of due diligence, would have discovered an infringement—or whether the alleged date of discovery reflected a lack of due diligence—is a fact-intensive inquiry that cannot be determined from the general nature of a copyright holder’s “sophistication” alone. A sophisticated plaintiff may well discover an infringement sooner than their less practiced neighbor. But the answer to the discovery question turns on *due diligence*—the fact-intensive inquiry of the copyright holder’s efforts to discover the infringement. An overly simplified “sophisticated plaintiff” presumption is antithetical to the nature of the task.

The district court therefore erred in concluding that it was clear from the face of MGP’s complaint that its

claims were time-barred. The district court reasoned that a plaintiff's "late discovery" of an alleged infringement was "unreasonable[]" or "implausible" when, as here, the complaint also alleged that the plaintiff generally took sophisticated and diligent efforts to detect infringements. *Michael Grecco Prods.*, 678 F. Supp. 3d at 409, 410. In this case, the district court pointed to the complaint's allegations about Grecco's advocacy for zealous copyright enforcement and his own efforts to seek out copyright infringements, namely that he "spends time and money to actively search for hard-to-detect infringements." *Id.* at 411 (quoting Compl. ¶ 11).

But the district court's concern that it was "unreasonable" or "implausible" that MGP's claims were timely was unfounded. MGP alleged that it discovered Davis's infringement on February 8, 2021, and commenced this action on October 12, 2021. On a motion to dismiss, MGP's allegations were to be taken as true, *see Melendez*, 50 F.4th at 298; the commencement date is well within the three-year period from the discovery date. While the district court apparently concluded that MGP's alleged February 2021 discovery of Davis's August 2017 infringement was "late," *Michael Grecco Prods.*, 678 F. Supp. 3d at 410, it did not find that MGP had failed to exercise due diligence in the years before its alleged discovery. Nor did it make a factual finding as to when and why MGP "with due diligence *should* have discovered" the alleged infringement, much less confirm that this hypothetical date was outside the three-year period before the complaint was filed. *See Psihoyos*, 748 F.3d at 124 (emphasis added).

Indeed, those findings would have required consideration of facts outside the complaint, and therefore could not be made on Davis's motion to dismiss. This was not

unusual. Affirmative defenses, like the statute of limitations, “often require[] consideration of facts outside of the complaint and thus [are] inappropriate to resolve on a motion to dismiss.” *Kelly-Brown*, 717 F.3d at 308. Here, MGP’s complaint did not address whether Davis’s infringement was relatively easy or difficult to discover, what technology was available for discovering infringements during the period Davis was allegedly using the Rose photos, whether MGP was then using any such technology, with what other methods and at what frequency MGP was then seeking to uncover infringements, or anything else about what specific efforts MGP was then making to detect infringements.

MGP’s general allegations of diligence did not address, much less resolve these questions. They did not make it “clear from the face of the complaint” that MGP’s failure to discover, years earlier, Davis’s alleged use of the Rose photos was attributable to a lack of due diligence, and that MGP should have discovered Davis’s alleged use of the Rose photos more than three years before the complaint’s filing. *See Sewell*, 795 F.3d at 339 (citation omitted). If anything, with the inferences properly construed in its favor, MGP’s allegations suggested, albeit very generally, the opposite—that it *was* exercising due diligence and thus its February 2021 discovery of Davis’s alleged infringement was as soon as diligently possible.

Moreover, even if the district court’s concern—that it was unreasonable or implausible that MGP’s claims were timely—had been well-founded, a likelihood, even a high one, that claims are untimely is not enough to make it “clear” that they are. *See id.* (citation omitted). To hold otherwise would improperly shift the pleading

burden for an affirmative defense from the defendant to the plaintiff.

To survive a motion to dismiss, a plaintiff must plausibly allege a claim, meaning “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In a copyright infringement case, a plaintiff must prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Abdin v. CBS Broad. Inc.*, 971 F.3d 57, 66 (2d Cir. 2020) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). Timeliness, however, is not an element of a copyright infringement claim. “The lapse of a limitations period is an affirmative defense that a *defendant* must plead and prove.” *Staehr*, 547 F.3d at 425 (citing Fed. R. Civ. P. 8(c)(1)) (emphasis added); *see also GEOMC Co., Ltd. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2d Cir. 2019) (describing pleading standards for an affirmative defense).

Importantly, “[t]he pleading requirements of the Federal Rules of Civil Procedure do not compel a litigant to anticipate potential affirmative defenses, such as the statute of limitations, and to affirmatively plead facts in avoidance of such defenses.” *Clark v. Hanley*, 89 F.4th 78, 93–94 (2d Cir. 2023) (internal quotation marks and citation omitted). In fact, “[p]laintiffs are under *no obligation* to plead facts supporting or negating an affirmative defense in the complaint.” *In Re: Nine West LBO Sec. Litig.*, 87 F.4th 130, 144 (2d Cir. 2023) (emphasis added).

Applying these standards here, MGP’s complaint needed to plausibly allege a claim of copyright infringement, but the complaint did not need to allege, plausibly

or otherwise, that the claim was timely. MGP's complaint could have therefore survived Davis's motion to dismiss even without its allegations about MGP's general level of diligence or the date it discovered Davis's infringement. Because MGP did offer those allegations, the district court was correct to consider whether they rendered it clear from the face of the complaint that the claims were time barred. But as described, they did not.

Nor did MGP's past litigation of infringement claims—unrelated to those here and against other defendants—somehow make it clear that the infringement claims in this action were untimely. The fact of MGP's past litigation experience was properly subject to judicial notice. *See Glob. Network Commc'ns, Inc.*, 458 F.3d at 156. However, past litigation involving different infringements by different defendants in no way proved that MGP's alleged failure to discover Davis's use of the Rose photos for several years was due to a lack of due diligence.

On remand, Davis may seek to plead her statute of limitations defense in her answer to MGP's complaint, and if proper, seek summary judgment on that defense. But at this stage, even if MGP's allegations suggested a copyright holder generally "sophisticated" in detecting copyright infringements, they did not make it clear from the face of the complaint that MGP's claims in this action were time-barred, or otherwise relieve Davis of her burden to plead and prove her statute of limitations defense.⁸

⁸ We do not now address whether or to what extent a court—when making the factintensive determination of when exactly a copyright holder should have, with the exercise of due diligence, discovered an alleged infringement—may properly consider the copyright holder's level of so-called "sophistication." In other words, may courts

CONCLUSION

For the reasons set forth above, we **VACATE** the district court's dismissal orders and **REMAND** for further proceedings.

properly conclude that the diligence due by a more sophisticated copyright holder is greater than that due by a less sophisticated copyright holder? We do not answer that question here. As described above, in this case, the district court dismissed MGP's complaint before reaching the fact-intensive diligence inquiry, instead applying a misunderstanding of the discovery rule and a wrong presumption that, as a matter of law, every "sophisticated" plaintiff should discover all infringements within three years of occurrence. We therefore leave for another day—in an appeal where the district court *has* reached the fact-intensive diligence inquiry—questions about what, if any, role a particular plaintiff's sophistication may play in that inquiry.

APPENDIX B
UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

21-CV-8381 (RA)

MICHAEL GRECCO PRODUCTIONS,
Plaintiff,

v.

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC., RUTHIE
ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,
Defendants.

ORDER

RONNIE ABRAMS, United States District Judge:

By a memorandum opinion and order issued June 20, 2023, the Court granted Defendants' motion to dismiss the Complaint without prejudice, indicating that Plaintiff may file any Amended Complaint within thirty (30) days. *See* Dkt. 23. Plaintiff has now filed a notice of his election to stand on his original Complaint. *See* Dkt. 24.

Accordingly, for the reasons set forth in the June 20, 2023 memorandum opinion, Defendants' motion to dismiss is granted in its entirety. The Clerk of Court is respectfully directed to close this action.

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SO ORDERED. Dated: July 19,
2023

New York, New York

Hon. Ronnie Abrams
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

21-CV-8381 (RA)

MICHAEL GRECCO PRODUCTIONS,

Plaintiff,

v.

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC., RUTHIE
ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,

Defendants.

MEMORANDUM OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff Michael Grecco Productions, Inc. brought this action against RADesign, Inc.; Davis by Ruthie Davis, Inc.; Ruthie Allyn Davis; Ruthie Davis, Inc.; and five individuals identified as Does 1–5 (collectively, “Defendants”), asserting claims for copyright infringement pursuant to 17 U.S.C. § 501, *et seq.* Now before the Court is Defendants’ motion to dismiss the Complaint as untimely filed. For the reasons that follow, the motion is granted, albeit without prejudice.

BACKGROUND

Plaintiff Michael Grecco Productions, Inc. owns copyrights for photographs created by its principal, Michael

Grecco—an “award winning commercial photographer and film director” who is “noted for his celebrity portraits”—and licenses his images for commercial use. Compl. ¶¶ 6–7. Defendants manufacture high fashion shoes, many of which are advertised and worn by well-known celebrities. *Id.* ¶¶ 14–15. As alleged in the Complaint, Grecco photographed celebrity Amber Rose wearing a pair of Ruthie Davis shoes for publication on the cover of Inked Magazine in 2017, and registered his copyright in the images two years later, in February 2019 (hereafter, the “Rose Photographs”). *Id.* ¶¶ 17–19; U.S. Copyright No. VA 2-143-439 (Feb. 19, 2019).

Although Defendants did not license the Rose Photographs or pay Plaintiff a fee for their commercial use, Defendants allegedly “republished at least two of these images on [the Ruthie Davis] website” after they appeared in the magazine, and also posted them on Twitter “to promote the Ruthie Davis brand.” *Id.* ¶¶ 21–24. After allegedly “discover[ing] the infringement on February 8, 2021,” Plaintiff sent Defendants a cease-and-desist letter in June 2021, and thereafter filed this copyright infringement action on October 12, 2021. *Id.* ¶¶ 27–31.

Significantly, in addition to Grecco’s work as a prominent celebrity photographer, the Complaint also alleges that he has extensive experience with copyright law and practice. *Id.* ¶ 11–12. In this capacity, he “leads workshops, addresses conferences and has released an educational video to assist artists in protecting their intellectual property from on-line content piracy.” *Id.* at ¶ 12. The Complaint further alleges that he participated in an interview, entitled “How (And Why) To Make Copyright Registration Part of Your Workflow,” describing “his system of routine copyright registration procedures

for the benefit of the profession in order to combat content theft.” *Id.* ¶ 11. Grecco also allegedly “spends time and money to actively search for hard-to-detect infringements, and enforces his rights under the Copyright Act.” *Id.* ¶ 11.

LEGAL STANDARD

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The Court must accept as true all factual allegations and draw all reasonable inferences in Plaintiffs’ favor, see *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008), but it need not credit “mere conclusory statements,” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations and alterations omitted).

“Dismissal under [Federal Rule of Civil Procedure 12(b)(6)] is appropriate when a defendant raises a statutory bar,’ such as lack of timeliness, ‘as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff’s claims are barred as a matter of law.’” *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015)

(quoting *Staeher v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)).

DISCUSSION

“Civil actions for copyright infringement must be ‘commenced within three years after the claim accrued.’” *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (quoting 17 U.S.C. § 507(b)). In this Circuit, infringement plaintiffs have the benefit of the so-called “discovery rule,” such that their “copyright infringement claims do not accrue until actual or constructive discovery of the relevant infringement.” *Id.* at 125. Thus, “an infringement claim does not ‘accrue’ until the copyright holder discovers, or with due diligence should have discovered, the infringement.” *Id.* at 124. Although “the standard for whether a plaintiff should have discovered the relevant infringement is an objective one,” *PK Music Performance, Inc. v. Timberlake*, 2018 WL 4759737, at *7 (S.D.N.Y. Sept. 30, 2018) (citing *Staeher*, 547 F.3d at 427), courts in this district regularly “look to the relative sophistication of the parties to determine whether the copyright holder should have, with the exercise of due diligence, discovered [the] alleged infringement,” *Gaffney v. Muhammad Ali Enters. LLC*, 2021 WL 3542256, at *3 (S.D.N.Y. Aug. 10, 2021).

The Court accepts as true each of the factual allegations in the Complaint, such that the following are not in dispute for purposes of the present motion: (1) Defendants’ use of the Rose Photographs on their website began on August 16, 2017, and “continued thereafter,” Compl. ¶ 30; (2) Plaintiff “discovered the infringement on February 8, 2021,” *id.* ¶ 31; and (3) Plaintiff filed this copyright infringement action on October 21, 2021, *see* Dkt. 1, more than four years after the alleged infringing

publication of the Rose Photographs on Defendants' website and Twitter profile.

Thus, in order for Plaintiff's infringement claims to fall within the three-year statute of limitations period under the Copyright Act, either Plaintiff must have been unable, "with the exercise of due diligence," to discover the infringing activity prior to August 16, 2020, three years after the infringing activity began, *Psihoyos*, 748 F.3d at 124, or his Complaint must allege separate infringing republication occurring on or after October 21, 2018, three years before his claims were actually filed. Because the face of the Complaint fails to allege facts plausibly supporting either circumstance, the Court agrees with Defendants that this action should be dismissed as time barred. *See Teva Pharm. USA, Inc. v. Sandoz Inc.*, 2013 WL 3732867, at *3 (S.D.N.Y. July 16, 2013) (citing *Staehr*, 547 F.3d at 425) ("Courts may grant motions to dismiss based on an affirmative defense so long as the applicability of the defense is apparent on the face of the complaint or documents incorporated by reference within the complaint.").

I. Application of the Discovery Rule

First, Plaintiff's relative sophistication as an experienced litigator in identifying and bringing causes of action for unauthorized uses of Grecco's copyrighted works leads to the conclusion that it should have discovered, with the exercise of due diligence, that the Rose Photographs were posted within the three-year limitations period. In this respect, as Defendants persuasively argue, this case is akin to *Minden Pictures, Inc. v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461 (S.D.N.Y. 2019) ("*Minden*"). In that case, although the plaintiff alleged that it had been unable to discover infringing activity until many years after it began, the court nevertheless

dismissed the copyright claim as time-barred, reasoning that a “reasonable copyright holder in Minden Pictures’ position—that is, a seasoned litigator that has filed 36 lawsuits to protect its copyrights, beginning as early as [seven years before the complaint]—should have discovered, with the exercise of due diligence, that its copyright was being infringed within the statutory time period.” *Id.* at 467. The same logic applies with equal force here, where Plaintiff had filed 134 separate copyright infringement cases between 2010 and early 2022. *See* Kirsch Decl., Ex. B.¹ In this respect, this case is also analogous to two recent opinions by this Court holding that the relative sophistication of the plaintiffs left them unable to rely on the discovery rule to resurrect time-barred copyright infringement claims. *See Lixenberg v. Complex Media, Inc.*, 2023 WL 144663, at *3 (S.D.N.Y. Jan. 10, 2023) (holding, where plaintiff had previously filed nearly 20 lawsuits, including two related to infringement of the same photograph at issue, that it should have discovered the alleged infringement within the limitations period); *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027, at *3 (S.D.N.Y. Mar. 27, 2023) (same, where plaintiff had previously filed more than 100 lawsuits) (hereafter, “*Complex Media*”).

To be sure, courts in this district have not uniformly accepted the rationale applied by the *Minden* line, and the Second Circuit has not yet weighed in either way. In *Parisienne v. Scripps Media, Inc.*, for instance, Judge Ramos reasoned that a plaintiff “does not have a general

¹ “[C]ourts routinely take judicial notice of documents filed in other courts, . . . not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

duty to police the internet for infringements” of its copyrighted works, and that this remained so even where the plaintiff was represented by a highly-sophisticated and experienced law firm which specialized in identifying and bringing copyright infringement claims. 2021 WL 3668084, at *4 (S.D.N.Y. Aug. 17, 2021) (cleaned up). Contrary to the defendant’s argument for dismissal that, because the plaintiff was an experienced copyright claimant—who thus should have discovered the alleged infringement within the limitations period—Judge Ramos denied the motion to dismiss, finding it was “not clear from the face of the complaint . . . that [the plaintiff’s] claims are barred as a matter of law.” *Id.* at *5 (cleaned up); *see also id.* (further justifying denial of the motion “especially considering that Defendant bears the burden of proof when raising the statute of limitations as an affirmative defense”). So too, in *Hirsch v. Rehs Galleries, Inc.*, Judge Broderick rejected the argument that a plaintiff who had previously discovered infringement of his photographs, and had hired a firm that “specializes in searching the internet for infringing conduct,” should have discovered infringing activity within the three-year statute of limitations period. 2020 WL 917213, at *5. Finding that the defendant was effectively seeking dismissal by arguing that the plaintiff had a “duty to police the internet to discover [the infringing] use of his Photograph,” Judge Broderick observed, “I have considered and rejected this argument before, as have other judges in this district.” *Id.* (citing *PK Music Performance, Inc.*, 2018 WL 4759737, at *8); *see also Baron Alan Wolman Achieves Trust v. BuzzFeed, Inc.*, 2022 WL 719633, at *2 (S.D.N.Y. Mar. 10, 2022)

(finding a defendant could not establish when the infringement claim had accrued for timeliness purposes without discovery).²

Absent instruction from the Second Circuit on this issue, the Court concludes, as it has previously, that *Minden* offers a useful framework in analyzing motions to dismiss on timeliness grounds where the face of the complaint itself establishes the unreasonableness of a plaintiff's late discovery of allegedly infringing activity. In *Complex Media*, for instance, this Court recently underscored that dismissal was appropriate because the complaint itself alleged that the plaintiff "uses sophisticated methods to detect infringing images," and that it worked "diligently to detect online infringements of its

² Three district courts in the Central District of California also appear to have rejected the *Minden* rule at least in part. See *Michael Stokes v. Honeydu, Inc.*, 2023 WL 2628685, at *2 (C.D. Cal. Feb. 9, 2023) (disagreeing with the defendant's reliance upon *Minden* and observing that the "[r]easonableness of discovering copyright infringement is generally a question of fact . . . the Court cannot conclude, based on the allegations in the SAC, that Plaintiff's failure to discover the alleged infringement sooner was unreasonable as a matter of law."); *Minden Pictures, Inc. v. Excitant Grp., LLC*, 2020 WL 8025311, at *3 (C.D. Cal. Dec. 14, 2020) (holding same, and noting that any "delay in filing the lawsuit" by plaintiff was a "question of fact that cannot be decided on a motion to dismiss"); *Mavrix Photo v. Rant Media Network, LLC*, 2020 WL 8028098, at *3 (C.D. Cal. Nov. 2, 2020) (finding same where the plaintiff had previously filed 40 copyright infringement lawsuits, and noting "other courts have not found a copyright holder had constructive notice of copyright violations solely due to the prior availability of internet-sourcing services"). A fourth court in that district distinguished the case, finding that the plaintiff "was not quite so litigious" as the one in *Minden*, which had filed 36 infringement suits covering the same works at issue. *Stars Entmt. LLC v. MGM Domestic Television Dist., LLC*, 510 F. Supp. 3d 878, 889 (C.D. Cal. 2021).

works” by “enlisting technology companies that crawl the internet to identify infringing uses.” 2023 WL 2648027, at *3 (cleaned up). Accepting those facts as true, it was implausible to the Court that the plaintiff only would have discovered the alleged infringement “nearly ten years” after the purported republication. *Id.* at *1, 3; see *Gaffney*, 2021 WL 3542256, at *3 (observing that courts regularly “look to the relative sophistication of the parties to determine whether the copyright holder should have, with the exercise of due diligence, discovered an alleged infringement”).

While other cases may present allegations which rightfully survive motions to dismiss under the discovery rule—just as it is of course true that a copyright plaintiff does not have a “duty to police the internet to discover” infringing uses of their work, *Hirsch*, 2020 WL 917213, at *5—here, the face of the Complaint alleges that the Plaintiff was particularly sophisticated in regularly seeking out and discovering online infringing uses. It alleges, among other things, that Grecco “leads workshops, addresses conferences and has released an educational video to assist artists in protecting their intellectual property from on-line content piracy.” Compl. ¶ 12. It further asserts that Grecco “spends time and money to actively search for hard-to-detect infringements,” and that he even described these methods in an interview providing a ‘how-to’ guide to prospective copyright infringement claimants, *id.* ¶ 11. The Court thus here holds that, even setting aside the 130-plus infringement lawsuits Plaintiff has previously filed, with allegations like these appearing in its own pleadings, it is “clear from the face of the complaint . . . that [P]laintiff’s claims are barred as a matter of law.” *PK Music Performance, Inc.*, 2018 WL 4759737, at *7.

II. Application of the Separate Accrual Rule

Second, Plaintiff's attempt to rely upon the so-called "separate accrual" rule is similarly unavailing given the allegations in the Complaint. Under that rule, "when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014). The Supreme Court has cautioned, however, that "[s]eparately accruing harm should not be confused with harm from past violations that are continuing." *Id.* at 671 n.6.

Here, the Complaint alleges only that Defendants' allegedly infringing "use of the images begun (sic) on August 16, 2017 and *continued thereafter*." Compl. ¶ 30 (emphasis added). It is therefore unclear whether Plaintiff's reliance on the separate accrual rule is based upon a theory that merely leaving a copyrighted work on a website—without more—constitutes separate infringement (thereby continuously triggering a restarted limitations clock), or whether Plaintiff instead intends to assert that there was a specific infringing republication of the Rose Photographs at some point later than August 16, 2017. If the former, that theory is foreclosed as a matter of law. As this Court explained at length in its recent opinion, "the continued presence of a copyrighted work on a website does not by itself give rise to a 'new wrong' under the Copyright Act." *Complex Media*, 2023 WL 2648027, at *4 (collecting cases); *see also id.* ("[T]he statute of limitations would be stripped of its force if it were triggered every time a web user accessed the allegedly infringing material."); *Bell v. The Oakland Cmty. Pools Project, Inc.*, 2020 WL 4458890, at *5 n.3 (N.D. Cal. May 4, 2020) (holding that the "mere fact that a

document remained online does not trigger the separate-accrual rule”). If, instead, Plaintiff is seeking to rely upon the latter theory, the Complaint must make specific plausible allegations of later infringing use of the Rose Photographs which would bring the copyright claims within the three-year limitations period. Indeed, just as this Plaintiff did in *Michael Grecco Productions, Inc. v. Valuwalk, LLC*, if it is attempting to argue that there was a later, separate instance of infringement which would bring any copyright claim within the limitations period, that circumstance must be alleged—and, if necessary, later proven to the trier of fact. *See* 345 F. Supp. 3d 482, 512 (S.D.N.Y. 2018).

III. Leave to Amend

Whether to grant leave to amend a complaint is committed to the “sound discretion of the district court.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). “Ordinarily a plaintiff should be granted leave to amend at least once after having the benefit of a court’s reasoning in dismissing the complaint.” *Obra Pia Ltd. v. Seagrape Inv’rs LLC*, 2021 WL 1978545, at *3 (S.D.N.Y. May 18, 2021). This is especially true on the Court’s first ruling on a motion to dismiss. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec. LLC*, 797 F.3d 160, 190 (2d Cir. 2015) (“Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies.”). “Granting leave to amend is futile,” however, “if it appears that a plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim.” *Panther Partners Inc. v. Ikanos Commc’ns, Inc.*, 347 F. App’x 617, 622 (2d Cir. 2009). Here, because it is conceivable that Plaintiff could

amend to allege a separately occurring act of distribution or publication of the Rose Photographs which would bring a copyright infringement claim within the three-year limitations period, the Court cannot conclude that any amendment would necessarily be futile.

CONCLUSION

Accordingly, for the foregoing reasons, Defendants' motion to dismiss is granted, albeit without prejudice. Plaintiff shall have the opportunity to amend its Complaint within thirty (30) days, provided it has a good faith basis for doing so.

SO ORDERED. Dated: June
20, 2023

New York, New York

Hon. Ronnie Abrams
United States District Judge

APPENDIX D
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

DOCKET No. 23-1078

MICHAEL GRECCO PRODUCTIONS,
Plaintiff-Appellant,

v.

RADESIGN, INC., DAVIS BY RUTHIE DAVIS, INC., RUTHIE
ALLYN DAVIS, RUTHIE DAVIS, INC., DOES 1–5,
Defendants-Appellees.

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand twenty-four.

Appellees, Davis by Ruthie Davis, Inc., Ruthie Allyn Davis, Does 1-5, RADesign, Inc. and Ruthie Davis, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.
FOR THE COURT: Catherine O'Hagan Wolfe, Clerk