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# ADDING INSULT TO INJURY? AN EVALUATION OF THE CURRENT STATE OF THE DISCOVERY RULE IN THE COPYRIGHT STATUTE OF LIMITATIONS

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## ABSTRACT

*This Note evaluates the appropriate scope of application of the discovery rule to the Copyright Act's statute of limitations through an analysis of legislative intent and statute of limitations precedent across different bodies of law. The 2024 Supreme Court decision in Warner Chappell Music, Inc. v. Nealy left open the question of whether the Copyright Act's three-year statute of limitations applies, as a default, the injury-occurrence or discovery rule of accrual. Widespread application of the discovery rule in copyright law by the lower federal courts exists in contrast to other bodies of law in which the Supreme Court has strongly articulated that the injury rule should be used as the default method of accrual for statutes of limitations. This Note attempts to reconcile such differences by proposing that the injury rule default, when complemented by common law equitable exceptions that employ a discovery rule in limited contexts, creates a middle ground between Supreme Court statute of limitations jurisprudence and extensive copyright case precedent. By placing the copyright statute of limitations injury versus discovery rule debate in a broader legal context, this Note weighs important policy considerations that accompany the unique demands of copyrightable works and explores the potential impact on other bodies of law.*

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## INTRODUCTION

Imagine that an American photographer takes a series of photos of a public figure's countryside estate in France.<sup>1</sup> Four years later, the public figure decides to sell the property. In anticipation of the sale, a major magazine publication contacts the public figure to do a cover story in its upcoming architecture issue. The public figure hates the images taken by the magazine's photojournalist and instead sends the publication the photo series from four years prior. The magazine editor also prefers the earlier photo series and under the impression that the public figure owns the work, publishes several of the photographer's images online and in print to accompany the article, including on the cover. It becomes the magazine's best-selling print issue. At the time of publication, the photographer is off-the-grid working on another project, without access to the internet. The photographer only discovers the magazine's use of her photos over two years after publication. One year later, the photographer brings a lawsuit for copyright infringement against the magazine to recover damages generated from its use of her works. The magazine files a motion to dismiss on the grounds that the relevant three-year statute of limitations period for copyright has lapsed. Is the photographer barred from recovery even though she filed suit soon after learning about the infringement? Should the magazine be held liable despite its lack of awareness as to the dubious ownership? Although imperfect, this hypothetical identifies that at least one key consideration for answering these questions depends on whether statute of limitations in copyright allows for application of a "discovery rule," which would enable a copyright owner to sue after learning of the infringement, and if so, on its appropriate scope of application.

A statute of limitations is a type of legal gatekeeper, intended to prevent unfair legal process against defendants that results from stale claims brought after an extensive passage of time. The more time that passes between an alleged injury and the commencement of litigation, the greater the risk of lost evidence, uncertainty, and reliance investments—such as in copyright cases, if a party were to continue to profit from an infringing work or even create new works derived from the infringing work. The relevant statute of limitations period in copyright law is three years from the time at which a claim *accrues*.<sup>2</sup> The precise definition of the point of accrual—being either the time at which the infringement occurs or the time at which the plaintiff knew or should have known of the infringement—historically lacks uniform

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1. The facts presented in this hypothetical are very loosely based upon the facts of the case *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 233–34 (5th Cir. 2023).

2. 17 U.S.C. § 507(b).

application across jurisdictions.<sup>3</sup> The first approach, which measures accrual from the point at which the infringing act occurs, is known as the incident of injury or injury-occurrence rule and is the so-called default interpretation according to the Supreme Court.<sup>4</sup> The second definition, which measures accrual from the point at which the plaintiff knew or should have known of the infringement, is known as the discovery rule.

The discovery rule steps in to protect the interest of a diligent plaintiff who could not have otherwise known of the injury. This underlying policy tension requires weighing copyright holders' interests in enforcing their legal rights against protecting parties, who rely in good faith on the belief that they hold copyright ownership, from unknown claims. There are relatively few, but nonetheless notable, bodies of law that automatically apply a discovery rule, favoring a diligent, yet unaware, plaintiff over the timely commencement of an action.<sup>5</sup> For these bodies of law, either the legislature specifies a discovery rule or the judiciary finds that the legislature intended to allow for application of the discovery rule.<sup>6</sup> The discovery rule is typically applied in one of two ways: (1) generally, to any action in which the plaintiff did not and could not have reasonably known of the infringement, or (2) limited, to cases in which equity demands application due to fraud or concealment by the infringing party. Within copyright disputes, nearly all federal appellate courts currently allow for use of the discovery rule, but each do so with a varied scope of application.<sup>7</sup>

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3. Compare *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994), with *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 247 (S.D.N.Y. 2004).

4. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

5. The Supreme Court applied a discovery rule to statutes of limitations for latent medical injuries in *Urie v. Thompson*, 337 U.S. 163, 169–71 (1949). The Court later applied a discovery rule to medical malpractice suits in *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

6. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.05(B)(2) (Matthew Bender, rev. ed. 2025).

7. See *Warren Freedendfeld Assocs., Inc. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) (“[I]n certain circumstances, accrual contemplates application of the so-called discovery rule.”); *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992) (“A cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised.”); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009) (“[T]he federal discovery rule governs the accrual of civil claims brought under the Copyright Act.”); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997) (“A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.”) (quoting *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994)); *Jordan v. Sony BMG Music Ent., Inc.*, 354 F. App’x 942, 945 (5th Cir. 2009) (“In this Circuit a copyright claim accrues ‘when [the party] knew or had reason to know of the injury upon which the claim is based.’ ” (quoting *Pritchett v. Pound*, 473 F.3d 217, 220 (5th Cir. 2006))); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (citing *Roley*, 19 F.3d at 481); *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 614 (7th Cir. 2014) (“Our circuit recognizes a discovery rule in copyright cases . . . .”); *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007) (relying on a holding that the discovery rule applies absent “ ‘a contrary directive from Congress’ ”) (quoting *Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998)); *Polar*

The Supreme Court's most recent clarification regarding the statute of limitations in copyright actions resolved a split between the Second and Ninth Circuit Courts over whether damages for a continuous infringement that were incurred more than three years before an action commenced were recoverable under the Copyright Act.<sup>8</sup> The case, *Warner Chappell Music, Inc. v. Nealy*, was brought by music producer Sherman Nealy in 2018, alleging that an interpolation of his work "Jam the Box" in Flo Rida's 2008 hit song "In the Ayer" infringed on his rights, and claiming that he did not become aware of the infringing activity until his release from prison in 2015.<sup>9</sup> Nealy sought damages and profits from Warner Chappell Music's licensing activities related to "In the Ayer" dating back to 2008.<sup>10</sup> Upon granting certiorari, the Court limited the question presented to the issue of damages in lieu of addressing the broader discovery rule versus injury rule question head-on because defendant-appellant Warner Chappell did not challenge the lower court's application of the discovery rule.<sup>11</sup> Despite this, counsel for the petitioner focused considerable time during oral argument on whether the Copyright Act allows for a discovery rule at all.<sup>12</sup> The dissenting Justices gave consideration to this "antecedent" discovery rule question in their written opinion.<sup>13</sup>

In turn, this Note closely examines the dissent's proposition that the Copyright Act "certainly does not tolerate a discovery rule" by analyzing legislative and judicial history to gain insight into whether the decision in *Warner Chappell* is destined to become a "dead letter."<sup>14</sup> This Note adds to existing literature regarding the copyright statute of limitations through an in-depth exploration of current frameworks used across different bodies of law to determine the discovery rule's appropriate scope of application, placing the copyright statute of limitations injury versus discovery rule debate in a broader legal context and exploring copyright's potential impacts

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*Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) ("[T]he three-year clock begins upon discovery of the infringement."); *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020) ("[A]n ownership claim accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights."); *Oppenheimer v. WL Mag. Grp., LLC*, 2021 U.S. Dist. LEXIS 253382, at \*6 (D.D.C. 2021) ("[T]he courts in this district that have applied the statute of limitations in the Copyright Act have also employed the discovery rule.").

8. See *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1137 (2024).

9. *Id.* at 1137–38.

10. *Id.* at 1137.

11. *Id.* at 1138.

12. See Transcript of Oral Argument at 3–17, *Warner Chappell*, 144 S. Ct. 1135 (No. 22-1087).

13. *Warner Chappell*, 144 S. Ct. at 1140 (Gorsuch, J., dissenting).

14. *Id.* at 1140 (Gorsuch, J., dissenting). A "dead letter" refers to a law or legal principle that "has lost its force or authority" without being formally changed, repealed, or abolished. *Dead Letter*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/dead%20letter> [https://perma.cc/K7PU-4UAG].

on other bodies of law. In turn, this Note will evaluate the policy considerations surrounding the discovery rule and analyze the impact of the *Warner Chappell* decision regarding damages on the broader question of the discovery rule's appropriate scope of application in copyright litigation.

This Note seeks to reconcile the widespread application of the discovery rule in copyright law by the lower federal courts with other bodies of law in which the Supreme Court has strongly articulated that the injury rule should be used as the default method of accrual for statutes of limitation. Further, this Note attempts to demonstrate that the injury rule default, when complemented by equitable exceptions that employ a discovery rule in limited contexts, creates a middle ground between Supreme Court statute of limitations jurisprudence and extensive copyright case precedent. This approach strikes a balance to simultaneously protect the rights of copyright holders and preserve stable expectations against surprise litigation for defendants.

Part I details the origins and policy considerations behind the three-year statute of limitations period for copyright actions, including a discussion of copyright infringement, recoverable damages, and legislative history. Part II closely examines the injury and discovery rules in a broader legal context, drawing upon the well-developed case law regarding a statute of limitations' point of accrual in other bodies of law, which provides a framework and point of comparison for copyright litigation. Part III highlights the tension between Supreme Court jurisprudence and application of a discovery rule by lower courts, demonstrating that the *Warner Chappell* decision contributes to an existing, implied authorization of a broadly defined discovery rule in copyright actions, likely contrary to Supreme Court precedent and legislative intent.

## I. BACKGROUND: COPYRIGHT, DAMAGES, AND THE THREE-YEAR STATUTE OF LIMITATIONS PERIOD

### A. AN OVERVIEW OF COPYRIGHT

Within the intellectual property umbrella, copyright is a body of law involving the legal protection of "original works of authorship fixed in any tangible medium of expression."<sup>15</sup> The primary purpose of this scope of protection is to promote the production of works of authorship, which are creative in nature such as visual art, literature, music, film, photography, and architecture.<sup>16</sup> This objective fits into the constitutional power of Congress

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15. 17 U.S.C. § 102(a).

16. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Sony Corp. of Am. v.*

“[t]o promote the Progress of Science and useful Arts” for a limited period of time, also known as the Intellectual Property Clause.<sup>17</sup> In other words, copyright law is an incentive for the authors of creative works to produce and share their works with the public by providing a protected mechanism for earning a profit. Copyright owners retain the exclusive rights to reproduce, perform publicly, display publicly, prepare derivatives<sup>18</sup> of, and distribute copies or phonographs of the copyrighted work.<sup>19</sup> The copyright owner also holds the exclusive right to authorize these uses.<sup>20</sup> The author of a work of visual art has the rights of attribution and integrity, subject to certain limitations.<sup>21</sup>

Further, ownership automatically vests in the author(s) of the work, unless the work was made for hire,<sup>22</sup> and in such case the work belongs to the author’s employer by default.<sup>23</sup> Ownership may be transferred either partially through a license or in its entirety through assignment of copyright.<sup>24</sup> Thus, the original creator of a work is not always the copyright holder. Many musical artists, for instance, may agree to sign all or parts of their copyright ownership over to a publisher such as a record label. These different groups of stakeholders have unique authorial and commercial interests that impact their motivation for bringing copyright infringement actions.

The Copyright Act does not require formal registration with the U.S. Copyright Office or official publication to protect these rights<sup>25</sup>—they are inherent to the author who creates the work once the work is fixed in a tangible medium.<sup>26</sup> Copyright historically values the interests of individual authors, distinct from a purely economic or utilitarian public interest approach, dating back to the 1710 British Statute of Anne.<sup>27</sup> The Constitution’s Intellectual Property Clause refers to rights of “Authors and Inventors,” which adopts the authorial approach to copyright reflected in the

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Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

17. U.S. CONST. art. I, § 8, cl. 8.

18. A “derivative work” is one that is “based upon one or more preexisting works,” which can include a re-imagining, a translation, or a modification. 17 U.S.C. § 101.

19. *Id.* § 106.

20. *Id.*

21. *See id.* § 106A.

22. If a work is “made for hire,” it was made within the creator’s scope of employment or commissioned for a use specified under 17 U.S.C. § 101. The employer is the author and thus owns all rights associated with the work. These works are sometimes owned by an entity, not a person.

23. 17 U.S.C. § 201.

24. *Id.*

25. *See id.* § 408(a) (“[R]egistration is not a condition of copyright protection.”).

26. U.S. Copyright Office, *Timeline: 1950–2000*, COPYRIGHT.GOV, [https://www.copyright.gov/timeline/timeline\\_1950-2000.html](https://www.copyright.gov/timeline/timeline_1950-2000.html) [<https://perma.cc/V6CZ-BLK8>].

27. Craig Joyce, *Prologue: The Statute of Anne*, 47 Hous. L. Rev. 779, 780 (2011).

Statute of Anne.<sup>28</sup> In eliminating registration and renewal requirements for works created during or after 1978, the Copyright Act automatically vests the associated rights in a work's author. Congress again implemented this change when the United States joined the Berne Convention in 1989, further harmonizing the American system with European copyright law and allowing authors who fail to register, provide proper notice, or pay associated fees to enforce their rights.<sup>29</sup>

However, copyright registration or preregistration is a prerequisite for bringing a civil action to recover for infringement and is effectively still a requirement to enforce the rights provided under the Copyright Act.<sup>30</sup> To collect actual damages and profits, a plaintiff must properly register the copyright generally at any time before commencing the action.<sup>31</sup> Failure to timely register a work can lead to other limitations. Specifically, a copyright owner can only recover statutory damages and attorney's fees if the registration predates the alleged infringement or if the work is registered "within 3 months after the first publication of the work" or "1 month after the copyright owner has learned of the infringement."<sup>32</sup> This minimal recognition of inherent authorial interests for U.S. copyright owners indicates that a higher value is placed in the commercial market and promoting public access.<sup>33</sup> These considerations are at the core of the Copyright Act and contextualize policy arguments regarding the appropriate point of accrual for the statute of limitations.

The relevant cause of action for a violation of rights held by copyright owners and enumerated in the Copyright Act is infringement. In an infringement action, a copyright holder must establish (1) valid ownership and (2) violation of an exclusive right. For instance, to prove unauthorized copying, the plaintiff would need to first establish they hold a valid copyright, then show that the defendant both had access to copyrighted material and that the works are substantially similar.<sup>34</sup> As noted above, the

28. U.S. CONST. art. I, § 8, cl. 8.

29. R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 U. COLUM. J.L. & ARTS 133, 177 (2007).

30. See 17 U.S.C. § 411(a). Registration or preregistration is required to bring an infringement action, apart from violations of rights of the author under 17 U.S.C. § 106A(a).

31. *Id.* § 411(a).

32. *Id.* § 412. Section 412 expressly provides for a discovery rule when registering a copyright ahead of commencing an action for infringement that seeks statutory damages or attorney's fees. *Id.* Notably, this express carve out does not appear in the provision regarding statute of limitations. See *id.* § 507(b).

33. Samuel Jacobs, Note, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where that Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 172 (2016).

34. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

duration of copyright protection is intentionally limited to strike a balance between incentivizing creation of works and allowing for entry into the public domain. The rationale behind these somewhat competing interests is to benefit the public. The current duration of copyright protection for a work created on or after January 1, 1978, is the life of the author plus seventy years.<sup>35</sup> Additionally, if the author is unknown or created the work for hire, and thus the work is owned by a business entity or employer, the appropriate copyright term is either 95 years from the year in which a work is first published or 120 years from its creation, whichever comes first.<sup>36</sup> During this period, the copyright owner is entitled to bring a civil claim of infringement so long as the action commences within the three-year statute of limitations window provided by 17 U.S.C. § 507 (“section 507”).<sup>37</sup>

## B. THE ROLE OF DAMAGES

Understanding the stakes of bringing a civil action for infringement requires a brief discussion of the types of damages recoverable under the Copyright Act. Courts may grant temporary and final injunctions to prevent or restrain infringement<sup>38</sup> and may order the impoundment, destruction, or disposition of copies and sources for the reproduction of the infringed work.<sup>39</sup> The monetary damages at stake in a copyright action can be substantial.<sup>40</sup> A successful plaintiff is entitled to recover either “actual damages and any additional profits of the infringer” or statutory damages.<sup>41</sup> Copyright owners may choose to recover statutory damages because the statute does not require proof of actual damages, making it easier for the plaintiff to prevail. Statutory damages can range from \$200 to \$150,000 depending upon the facts of the case, including whether the infringement was “committed willfully.”<sup>42</sup> Actual damages, depending on the scale of the infringement, may far exceed the amount recoverable from statutory damages, even though the probative burden of proof is higher.

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35. 17 U.S.C. § 302(a); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998); U.S. Copyright Office, *supra* note 26.

36. 17 U.S.C. §§ 302(e), 305.

37. *Id.* § 507.

38. *Id.* § 502.

39. *Id.* § 503.

40. *Understanding the Cost of Copyright Infringement Lawsuits*, IP INS. SERVS. CORP. (June 28, 2024) (internal citation omitted), <https://ipisc.com/understanding-the-cost-of-copyright-infringement-lawsuits> [<https://perma.cc/396K-PUZA>].

41. 17 U.S.C. § 504(a)(1).

42. *Id.* § 504(c)(2). “[T]he copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.” *Id.* § 504(c)(1). Additionally, if the copyright owner proves the burden of establishing willful infringement, “the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” *Id.* § 504(c)(2).

As stated above, statutory damages are only available to copyrights properly registered within three months of publication or one month of discovery of the infringement. Because damages include profits that can accumulate substantially over time, the statute of limitations acts as an equalizer to incentivize timely filing of an action against alleged infringers. The court may also, in its discretion, allow the recovery of full costs or reasonable attorney's fees incurred during litigation.<sup>43</sup> Rejection of a bar on a plaintiff's ability to retroactively recover damages for a continuing infringement that occurred partly outside the statute of limitations period was the focal point of *Warner Chappell Music, Inc. v. Nealy*, which will be discussed further in Part III.

Moreover, the costs associated with civil infringement litigation are vast and may include attorney's fees, payment for expert witnesses, lengthy discovery, negotiation and settlement, and potentially a trial.<sup>44</sup> The American Intellectual Property Law Association's 2023 Report of the Economic Survey estimates that the average cost of litigating a copyright case through trial is \$1.4 million.<sup>45</sup> Both parties stand to incur substantial costs from litigating infringement cases through the trial phase. As a result, many litigants opt to reach out-of-court settlements as an alternative, oftentimes for large sums.<sup>46</sup> Plaintiff's attorneys may choose to work on a contingency basis, mitigating to some extent the burden of litigation costs.

### C. THE COPYRIGHT ACT STATUTE OF LIMITATIONS: LEGISLATIVE HISTORY AND INTENT

To encourage efficiency of legal process and promote fairness, the ability to sue for infringement and recover respective damages has its own time-bar. Section 507(b) of the Copyright Act imposes a three-year statute of limitations on enforcing copyright through civil actions.<sup>47</sup> Copyright infringement bears a similarity to tort and breach of contract actions. To place the three-year copyright limitations period in context, state limitation periods for tort actions are typically between two and four years, while contract actions range from three to ten years.<sup>48</sup> There is significant debate

43. *Id.* § 505.

44. *Copyright Litigation 101*, THOMSON REUTERS (Dec. 16, 2022), <https://legal.thomsonreuters.com/blog/copyright-litigation-101> [<https://perma.cc/HWW5-AV6R>].

45. *Understanding the Cost of Copyright Infringement Lawsuits*, *supra* note 40.

46. See Candace Sundine, Note, *Sohm Starz Will Never Align: How the Split Between the 2nd and 9th Circuits Will Impact Damages in Copyright Cases*, 43 LOY. L.A. ENT. L. REV. 37, 64–65 (2022).

47. “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).

48. *Civil Statutes of Limitations*, NOLO (Jan. 21, 2026), <https://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html> [<https://perma.cc/S4ZK-5E92>].

over how to interpret this code section. Examination of the legislative history behind what became section 507(b) is necessary to understand the context of the current statute of limitations period.

Prior to 1958, there was no federal statute of limitations for bringing copyright infringement actions.<sup>49</sup> Many courts would apply state statute-of-limitations periods governing civil tort actions, or some other cause of action, including breach of contract or conversion.<sup>50</sup> The diversity in length of time to file suit between jurisdictions created a forum shopping problem that establishing a uniform statute of limitations period would directly resolve.<sup>51</sup> Congress amended then—section 115 of Title 17, United States Code, to include a three-year statute of limitations period for civil actions—identical to the existing period for criminal proceedings.<sup>52</sup> The three-year bar on civil claims is well established in copyright law. The Copyright Act of 1976 converted the existing formulation of the statute of limitations into section 507.<sup>53</sup> The House of Representatives indicated that the language adopted by the 1957 iteration of the copyright statute of limitations represented a “reconciliation of views” regarding the appropriate statute of limitations period for civil copyright actions.<sup>54</sup> Subsequent statutory amendments to section 507 by Congress since 1976 have only altered the language of subsection (a) regarding limitations on criminal actions, leaving the civil three-year limitation period unchanged.<sup>55</sup>

Contextualizing policy arguments surrounding application of the discovery rule requires a discussion of the legislative intent behind section 507(b) of the Copyright Act, in addition to a brief exploration of its history. The question of legislative intent is pertinent to finding an appropriate point of accrual within the three-year civil statute of limitations period. The 1957 Committee on the Judiciary, which amended Title 17 to provide for a civil statute of limitations, was concerned with the lack of uniformity that

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49. John E. Theuman, Annotation, *Construction and Application of 17 U.S.C.A. § 507(b), Requiring that Civil Copyright Action Be Commenced Within 3 Years After Claim Accrued*, 140 A.L.R. Fed. 641, at \*2 (2019).

50. *Id.*

51. *Id.*

52. Act of Sept. 7, 1957, Pub. L. No. 85–313, 71 Stat. 633 (current version at 17 U.S.C. § 507).

53. Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, 2586 (1976) (codified as amended at 17 U.S.C. § 507).

54. H.R. REP. NO. 94-1476, at 164 (1976), as reprinted in 1976 U.S.C.C.A.N. 5754.

55. No Electronic Theft (“NET”) Act, Pub. L. No. 105–147, 111 Stat. 2678 (1997) (extending the criminal statute of limitations to five years in 1997 and adding language to create space for any exceptions in 1998). Criminal copyright liability may attach when conduct “willfully infringes” and either involves the purpose of commercial advantage or financial gain, reproduction or distribution with a value over \$1000, or unauthorized distribution of a work that was knowingly being prepared for commercial distribution. 17 U.S.C. § 506(a).

incentivized “forum shopping.”<sup>56</sup> Two broadly construed interest groups were identified, noting that publishers typically have an interest in shorter periods while owners desire longer periods, which also promoted a variance in triable claims across jurisdictions depending on the scale of industry involving copyrighted works in those areas.<sup>57</sup> In other words, jurisdictions with significant markets for copyrighted works, such as California—being the epicenter of the film industry—may have imposed shorter limitations periods than jurisdictions in which owners were less likely to bring an action for infringement.<sup>58</sup>

The Senate Committee addressed two primary questions when drafting the statute: (1) what constituted the “most equitable” limitations period given the competing interests of different groups, and (2) whether the statute set out “specific equitable considerations” regarding tolling.<sup>59</sup> Tolling is a legal doctrine that pauses the running of the allotted statute of limitations period.<sup>60</sup> The Library of Congress advised that the 1957 statute should suspend the limitations period due to “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.”<sup>61</sup> These are equitable considerations that prioritize fairness for a plaintiff seeking to enforce the rights afforded by copyright. Additionally, fraudulent concealment occurs when a party intentionally hides an infringing act from the copyright owner to defraud or deceive.<sup>62</sup> The same letter from the Library of Congress noted it was “unnecessary or unwise” to include an exception for fraudulent concealment because very few cases in copyright feature this as a “material problem.”<sup>63</sup>

Despite these concerns, the statute as amended specifies no equitable considerations because the House Judiciary Committee concluded that “[f]ederal district courts, generally, recognize these equitable defenses

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56. S. REP. NO. 85-1014, at 2 (1957), as reprinted in 1957 U.S.C.C.A.N. 1961, 1962. Limitations period ranging from one to eight years created uncertainty for litigants on both sides of copyright infringement actions. *Auscipe Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 245 (S.D.N.Y. 2004). Forum shopping occurs when a party elects to file their lawsuit in a jurisdiction they believe will most likely result in a favorable outcome.

57. S. REP. NO. 85-1014, at 2.

58. *Id.*

59. *Id.*

60. *Equitable Tolling*, BLACK'S LAW DICTIONARY (12th ed. 2024).

61. S. REP. NO. 85-1014, at 5 (emphasis omitted).

62. This articulation of “fraudulent concealment” applies the *Black's Law Dictionary* definition to the copyright context. *Fraudulent Concealment*, BLACK'S LAW DICTIONARY (12th ed. 2024).

63. S. REP. NO. 85-1014, at 5.

anyway.”<sup>64</sup> The Senate Report, as advised by the Library of Congress, also included statements to indicate the intent of the amendment was a “limitation based upon the remedy” and not “upon the substantive right.”<sup>65</sup> Each of these reports indicates the legislative intent behind the three-year statute of limitations period and any accompanying language in the statute. Congress has made no substantive changes to the limitation on civil actions even though it has amended the Copyright Act nearly eighty times since 1976.<sup>66</sup>

## II. DEFINING “ACCRUAL”: THE INJURY VS. DISCOVERY BATTLE

### A. GENERAL PURPOSE OF STATUTES OF LIMITATION

Statutes of limitation are embedded in state and federal law, the lengths of which are specific to the relevant body of law and determined by the legislature and courts across different jurisdictions. Statutes of limitation are historically recognized as an important means of regulating litigation. They are characterized as “rules demanded by the soundest principles of public policy”<sup>67</sup> and “vital to the welfare of society.”<sup>68</sup> The judicial role in forming the law around statutes of limitation is “less important than and subordinate to the role played by the legislature.”<sup>69</sup> However, the courts examine how the law should apply in each unique case or context, and best determine the scope of equitable considerations given existing precedent and legislative intent. Statutes of limitation aim “to prevent fraudulent and stale actions from springing up after a great lapse of time.”<sup>70</sup> Statutes of limitations are typically raised and asserted as either an affirmative defense to a plaintiff’s claim or a doctrine of equitable tolling.

Statutes of limitation are embedded in state and federal law and are inherently context-specific; therefore, any comparison between different bodies of the law is imperfect but nonetheless informative. As stated above, the copyright statute of limitations period bars civil actions brought more than three years after the claim accrued.<sup>71</sup> For any cause of action based on federal law, such as copyright, the limitations period stops running when a complaint is properly filed.<sup>72</sup> Accordingly, determining the point from which

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64. *Id.* at 3 (quoting the House Judiciary Committee Report).

65. *Id.*

66. Transcript of Oral Argument, *supra* note 12, at 35.

67. 1 HORACE G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 7–8 (John M. Gould & Dewitt C. Moore eds., Matthew Bender & Co. 1916) (1893).

68. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

69. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 459 (1997).

70. WOOD, *supra* note 67, at 8.

71. 17 USC § 507(b); *see supra* note 47 and accompanying text.

72. FED. R. CIV. P. 3; 1 JAMES W. MOORE, ALLAN D. VESTAL & PHILIP B. KURLAND, MOORE’S

to run the limitations period is important to adhering to the policy judgements made and considered during the creation of the statute of limitations. Exploring the unique frameworks available to copyright in a broader civil procedure context informs the direction that Congress or the Supreme Court will take in defining the applicability of the discovery rule to copyright litigation.

The Supreme Court has distinguished statutes of limitations from statutes of repose—which bar claims brought after passage of time from a specific event, regardless of whether the cause of action is complete—by emphasizing that a statute of limitation is a “procedural bar to recovery that does not affect the validity of the underlying right.”<sup>73</sup> Plainly stated, statutes of limitation dictate the time frame within which an action must be brought in order to enforce the right violated, but they are not “canceling the obligation” to respect the right itself.<sup>74</sup> In comparing statutes of limitations, the Court clarified that a statute of repose “puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.”<sup>75</sup> This distinction matters in copyright cases involving multiple instances of infringing acts. The difference between statutes of limitations and statutes of repose highlights the more flexible purpose behind statutes of limitation, indicating an intentional ambiguity regarding the appropriate point of accrual. The treatise, *Moore’s Manual: Federal Practice and Procedure*, states that “unless Congress has expressly stated to the contrary, a statute of limitations is *not* jurisdictional, and is subject to equitable principles such as equitable tolling.”<sup>76</sup>

#### B. TWO (OR THREE) COMPETING FRAMEWORKS: DEFINING “ACCRUAL” IN A BROADER CIVIL PROCEDURE CONTEXT

If statutes of limitation are by their nature subject to equitable principles, in what contexts do principles such as equitable tolling and the discovery rule come into consideration? Various substantive bodies of law, through judicial interpretation, have adopted unique frameworks for defining the statutory point of accrual. At the core of this discussion regarding frameworks for accrual lies the existing debate between the incident of injury

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MANUAL: FEDERAL PRACTICE AND PROCEDURE § 10.03 (Matthew Bender & Co. 2024) (1962) (citing *West v. Conrail*, 481 U.S. 35, 38–39 (1987)).

73. MOORE ET AL., *supra* note 72, § 10.03(4) (citing *Keiran v. Home Cap.*, 720 F.3d 721, 732 (8th Cir. 2013)).

74. WOOD, *supra* note 67, at 3.

75. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014).

76. MOORE ET AL., *supra* note 72, § 10.03(4) (citing *United States v. Kwai Fun Wong*, 575 U.S. 402, 407–10 (2015)).

and discovery rules. There is a general trend in legislation and in the courts towards a preference for the discovery rule.<sup>77</sup> However, the discovery rule itself has competing definitions and contexts that limit its own applicability to a range of statutes of limitations.

### 1. The Injury Rule “Default”

The incident of injury rule dictates that the statute of limitations period commences on the same day that the injury occurs. Therefore, this rule defines the point of accrual as when the plaintiff has a “‘complete and present cause of action.’”<sup>78</sup> This phrasing on its face eliminates the possibility of a subjective standard. If the point of accrual is to be an objective standard, it is determined by the moment at which the final element that makes up the relevant cause of action is satisfied. Furthermore, some bodies of law differentiate the injury-causing *act* from the occurrence of the resulting *injury* itself.<sup>79</sup> Both of these definitions fall within the scope of a subjective injury rule, and the latter simply requires actual harm before the cause of action is said to be complete. For example, the Administrative Procedure Act (“APA”) requires a plaintiff to have suffered an injury before bringing the action, so the statute of limitations will not begin to accrue until the injury occurs, even if that injury did not materialize until many years after the act.<sup>80</sup> The injury rule has also been held to apply to recovery of damages for claims alleging federal antitrust violations.<sup>81</sup>

Existing scholarship identifies several policies in favor of placing time limitations on civil actions that are, for the most part, arguments focused on and in favor of the injury rule for accrual. These policies are based in pragmatic considerations for procedural risks, including minimizing deterioration of evidence, reducing the volume of litigation, and avoiding “retrospective application” of newer legal standards.<sup>82</sup> The policies also draw upon equitable considerations such as reducing uncertainty, encouraging diligence, and allowing for peace of mind.<sup>83</sup> By enacting and interpreting statutes of limitation, the courts and legislatures prioritize these procedural and pragmatic considerations for defendants by foregoing potential recovery in some otherwise meritorious cases. Proponents of the

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77. Ochoa & Wistrich, *supra* note 69, at 458.

78. Rotkiske v. Klemm, 589 U.S. 8, 13 (2019) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 418–19 (2005)).

79. MOORE ET AL., *supra* note 72, § 10.03(4).

80. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024).

81. *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) (“Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff’s business.”).

82. Ochoa & Wistrich, *supra* note 69, at 494.

83. *Id.*

injury rule emphasize the importance of strictly adhering to these policy considerations.

The decisions in several Supreme Court cases this century have strongly articulated that the injury rule is the default method for defining the point of “accrual” in an action, some of which are worth examining to situate the conversation with respect to copyright actions. Foremost, in *TRW Inc. v. Andrews*, the majority noted that, outside of the historically recognized exception for lawsuits dealing with fraud, the Court has only “recognized a prevailing discovery rule” for latent disease and medical malpractice suits.<sup>84</sup> The “discovery rule” in this case refers to a broad application of the discovery rule, beyond contexts of fraud or concealment. In his concurring opinion, Justice Scalia referred to the discovery rule as “bad wine of recent vintage,” and pointed to the uniquely “humane” legislation at issue in medical malpractice cases, finding it to be aligned with congressional intent to allow application of a general discovery rule.<sup>85</sup>

Additionally, the majority stated that the Fair Credit Reporting Act (“FCRA”) “does not govern an area of the law that cries out for application of a discovery rule” and the statute specifically provides for the discovery rule in contexts of misrepresentation by the defendant.<sup>86</sup> Further, the Court’s majority opinion held that the statute itself intended to preclude judicial implication of the discovery rule.<sup>87</sup> The policy argument in favor of imposing a broad discovery rule on the FCRA—protecting the interests of a consumer who is unaware of an improper credit disclosure and therefore does not bring an action—is not unique enough to outweigh the general, traditional rule of running the limitations period from the point of injury. The Court effectively implied, as Justice Scalia argued, that the discovery rule is an exception to the general incident of injury rule. Absent clear congressional approval in the actual text of the statute, the courts are to assume that the injury rule is the default—the appropriate rule for accrual unless the statute’s text provides otherwise.

The Supreme Court has since emphasized that the injury rule of accrual should be applied as a default to statutes of limitation. In 2013, the Court’s majority opinion in *Gabelli v. SEC* quoted an 1889 case to argue that a discovery rule should only be applied in limited areas of the law: “[T]he cases in which ‘a statute of limitation may be suspended by causes not

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84. *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). The only occasion SCOTUS imputed a discovery rule at this point in time was in latent medical injuries in *Urie v. Thompson*, 337 U.S. 163, 169–71 (1949), and reiterated for medical malpractice in *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

85. *TRW*, 534 U.S. at 37–38 (Scalia, J., concurring) (internal citation omitted).

86. *Id.* at 28.

87. *Id.*

mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.’ ”<sup>88</sup> In 2019, the Court’s majority opinion in *Rotkiske v. Klemm*, written by Justice Thomas, quotes Justice Scalia’s concurrence in *TRW*: “This expansive approach to the discovery rule is a ‘bad wine of recent vintage.’ ”<sup>89</sup> The statute at issue, the Fair Debt Collection Practices Act (“FDCPA”), included a “violation occurs” provision and did not mention any discovery rule exception.<sup>90</sup> Like in *TRW*, the statute did not actually include a discovery rule in its textual language, nor was Congress silent on the definition of an accrual point.

Furthermore, occurrence of an injury gives a plaintiff the ability to sue because it is an essential element of a cause of action in many bodies of law. This principle was explored further in another 2024 Supreme Court decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.<sup>91</sup> This case held that a cause of action under the APA does not accrue until the plaintiff suffers an injury, and not simply when an agency action is final.<sup>92</sup> The Court quoted *Rotkiske* in stating it is “particularly inappropriate” to read language into a statute of limitations if Congress has, in other statutes, adopted the language that was omitted.<sup>93</sup> *Corner Post* echoes Supreme Court precedent that repeatedly refused to assume interpretations other than an incident of injury default rule when the text of the statute at issue is otherwise silent and the legislative intent does not clearly support an alternative reading, even when lower courts historically held otherwise.<sup>94</sup>

## 2. The Discovery Rule

The general discovery rule in statutes of limitation states that a cause of action does not begin to accrue until the party knows or reasonably should have known of the injury. It follows that, under a discovery rule, the statute of limitations does not begin to run until the plaintiff is put on notice regarding the complete and present cause of action. If a party affirmatively

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88. *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (quoting *Amy v. Watertown* (No. 2), 130 U.S. 320, 324 (1889)).

89. *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (quoting *TRW*, 534 U.S. at 37 (Scalia, J., concurring)).

90. *Id.* at 14–15.

91. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsr. Sys.*, 144 S. Ct. 2440, 2450 (2024).

92. *Id.*

93. *Id.* at 2446 (quoting *Rotkiske*, 589 U.S. at 14).

94. *TRW*, 534 U.S. at 27 (“We have also observed that lower federal courts ‘generally apply a discovery accrual rule when a statute is silent on the issue.’ ” (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000))); *Corner Post*, 144 S. Ct. at 2449 (“At least six Circuits now hold that the limitations period for ‘facial’ APA challenges begins on the date of final agency action—e.g., when the rule was promulgated—regardless of when the plaintiff was injured.”).

knows the cause of action is complete, that party has actual notice. Arguably encompassed in the “reasonably should have known” language is when a plaintiff is charged with having inquiry or constructive notice of the claim. Inquiry notice is imputed on a party when “the information would lead an ordinarily prudent person to investigate the matter further.”<sup>95</sup> The Supreme Court has referred to this broadly defined discovery rule as a “principle of statutory interpretation.”<sup>96</sup> The Court will allow for a broad discovery rule when the statute that creates the cause of action explicitly or impliedly calls for its application. For example, the statute of limitations for civil actions provided in the text of the Defend Trade Secrets Act (“DTSA”) is three years from which the misappropriation of a trade secret “is discovered or by the exercise of reasonable diligence should have been discovered.”<sup>97</sup> The legislature expressly provided for the discovery rule’s application under the DTSA and even clarified that “continuing misappropriation constitutes a single claim of misappropriation.”<sup>98</sup>

Policies that disfavor imposing statutes of limitations share common ground with policies that favor a broader application of the discovery rule, including to promote the adjudication of claims on their merits and to provide recourse for meritorious claims.<sup>99</sup> There is a general sense of justice that is furthered by a discovery rule that enables a party to enforce their rights upon finding out about the injury or violation of right. If a party does not and cannot discover the injury, plaintiffs are inclined to argue they should still be entitled to a judgment on the merits and recovery. However, because relying on a plaintiff’s individualized circumstances delays the point of accrual, widespread allowance of a discovery rule has the potential to undermine the original intent behind statutes of limitation.

The first bodies of law in which the discovery rule was recognized by the Court as necessary for the statute of limitations are latent disease and medical malpractice. In *Urie v. Thompson*, the Supreme Court noted that “the afflicted employee can be held to be ‘injured’ only when the accumulated effects of the deleterious substance manifest themselves” and emphasized the injustice in barring a claim under the Federal Employers’ Liability Act through a comparison to latent disease discovered in a workers compensation claim.<sup>100</sup> The discovery rule, working in its best intended

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95. *Inquiry Notice*, BLACK’S LAW DICTIONARY (12th ed. 2024). There are multiple methods of notice under the Copyright Act. See 17 U.S.C. §§ 401–06.

96. *Rotkiske*, 589 U.S. at 12.

97. 18 U.S.C. § 1836(d).

98. *Id.*

99. *Ochoa & Wistrich*, *supra* note 69, at 500, 505.

100. *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (quoting *Associated Indem. Corp. v. Indus. Accident Comm’n*, 12 P.2d 1075, 1076 (Cal. Ct. App. 1932)).

purpose, allows relief for an injured party whose injury did not “manifest” within the statute of limitations period. The Court recognized that legislation, “humane” by nature, would not have intended to bar recovery because of “blameless ignorance.”<sup>101</sup> However, once armed with the “critical facts that he has been hurt and who has inflicted the injury,” the plaintiff is responsible for promptly bringing the action.<sup>102</sup> Therefore, even in a medical malpractice context, the plaintiff must be reasonably diligent in pursuing the cause of action once the injury can be known.

Distinguishing between harm and the point of injury is useful in such context. In a latent injury or medical malpractice case, the injury-causing event could take place at any period of time before the harm physically presents itself. Additionally, under *Quinton v. United States*, a medical malpractice claim brought under the Federal Tort Claims Act “[could] be maintained within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based.”<sup>103</sup> Noting that states have carved out their own exceptions to statutes of limitation for medical malpractice cases, the Fifth Circuit recognized a need for uniformity under this federal act to align with congressional intent.<sup>104</sup> Relying heavily on the reasoning in *Urie*, the Fifth Circuit concluded that the plaintiff could not have known of the medical negligence at the time it occurred.<sup>105</sup> In these cases, it would be against public policy to prevent recovery when a plaintiff could not have reasonably discovered the complete cause of action. On one hand, policy considerations demanding a discovery rule specifically when a harm has not yet manifested itself could be distinguished from a case in which the harm and point of injury are one and the same, but the plaintiff remains blamelessly ignorant until the statute of limitations period has lapsed. On the other hand, if harm is defined as an essential element to the relevant cause of action, there is no need to separate the two concepts.

Outside of medical injury contexts, courts look to statutory interpretation and legislative intent when deciding whether to imply a broad discovery rule in distinct bodies of law. The Supreme Court has stated that “[w]e must enforce plain and unambiguous statutory language.”<sup>106</sup> Under the

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101. *Id.*

102. *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

103. *Quinton v. United States*, 304 F.2d 234, 235 (5th Cir. 1962).

104. *Id.* at 236.

105. *Id.* at 241. *Cf.* *United States v. Kubrick*, 444 U.S. 111, 123 (1979) (explaining that a plaintiff who was not diligent, despite being armed with the relevant facts, should have known of the federal tort claim).

106. *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 589 U.S. 178, 184 (2020) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)).

Employee Retirement Income Security Act (“ERISA”), an employee with “actual knowledge” must bring suit “within three years of gaining that knowledge.”<sup>107</sup> In such case, the ERISA statute itself defines the scope of the discovery rule to preclude even the limitations that come with inquiry notice. The Court determined that “actual knowledge” could not be met through proof of sufficient disclosure.<sup>108</sup> Clear congressional intent, gleaned through the language of the ERISA statute indicates that arguments stating a party “should have known” are insufficient. When Congress recognizes a discovery rule through the language of a statute, unless explicitly construed otherwise, the courts acknowledge that the discovery rule encompasses “not only once a plaintiff *actually* discovers the facts, but also when a hypothetical reasonably diligent plaintiff would have discovered” the facts constituting the cause of action.<sup>109</sup> In *Merck & Co. v. Reynolds*, the Court clarified the general definition of “discovery” for securities fraud cases—a cause of action in which the statute’s language specifically calls for a discovery rule—includes the point at which “the facts would lead a reasonably diligent plaintiff to investigate.”<sup>110</sup> The Supreme Court is generally reluctant to read a broad discovery rule into a statute outside of contexts in which the rule is explicit in the text or obviously intended by the legislature, such as in actions arising from an ERISA violation, medical malpractice, or latent disease.

### 3. Limiting the Discovery Rule to an Equitable Tolling Exception

While a broad discovery rule is most commonly limited to contexts in which legislative intent or statutory language clearly calls for its application, there is longstanding consensus in support of applying the discovery rule to situations involving equitable concerns such as fraud or concealment. Thus, the Supreme Court has characterized this application of the discovery rule standard as “an equitable doctrine” as opposed to a matter of statutory interpretation.<sup>111</sup> The Supreme Court has distinguished fraud cases from “traditional equitable tolling”<sup>112</sup> and “has repeatedly characterized these decisions as applying an equity-based doctrine.”<sup>113</sup> Because the fraudulent concealment exception is so important to maintaining equity for a plaintiff’s ability to bring a cause of action, it is essentially a component of the default

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107. *Id.* at 180.

108. *Id.* at 183–84.

109. *Merck & Co. v. Reynolds*, 559 U.S. 633, 646–47 (2010).

110. *Id.* at 651; *see* 28 U.S.C. § 1658(b)(1).

111. *Rotkiske v. Klemm*, 589 U.S. 8, 15 (2019).

112. *Id.* (first citing *Merck & Co.*, 559 U.S. at 644; and then *Gabelli v. SEC*, 568 U.S. 442, 450 (referring to the “fraud discovery rule”).

113. *Id.*

incident of injury rule. However, the Supreme Court has distinguished between “equitable tolling” and a “fraud-based discovery rule,” noting that tolling is an extraordinary exception that temporarily pauses a limitations period after it commences while the fraud-based discovery rule “sets the time at which a claim accrues.”<sup>114</sup>

For lawsuits involving fraud, the Supreme Court has long held that the statute of limitations commences upon discovery.<sup>115</sup> In a case from 1946, the Supreme Court recognized use of the discovery rule in cases involving injury from fraud in which a plaintiff was unaware “without any fault or want of diligence or care on his part,” stating that “the bar of the statute does not begin to run until the fraud is discovered.”<sup>116</sup> The Court further noted that “[t]his equitable doctrine is read into every federal statute of limitation.”<sup>117</sup> The Court has since reiterated the presumption that a discovery rule applies in cases of fraud or concealment.<sup>118</sup> Beyond textual arguments, courts weigh context-specific policy considerations in determining whether application of a discovery rule expanded beyond fraud or concealment is appropriate. In *Wolk v. Olson*, the Pennsylvania Eastern District Court, drawing upon reasoning from a number of jurisdictions, held that there is no place for a discovery rule in the statute of limitations period for mass-media defamation actions.<sup>119</sup> The court noted that a discovery rule is intended for cases in which the plaintiff’s injury “is not immediately ascertainable.”<sup>120</sup> By its very nature, mass-media defamation is public and highly unlikely to be hidden from the prospective plaintiff beyond the legislatively determined limitations period. Ultimately, adopting an expansive use of the discovery rule, beyond fraud or concealment, requires explicit or implied statutory authorization that aligns with relevant policy considerations.

Additionally, courts have also limited the scope of a fraud-based discovery rule when appropriate to maintaining the purpose of the limitations period. In *Rotella v. Wood*, the Supreme Court rejected a “pattern discovery” rule in civil actions arising under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), while still acknowledging that “federal statutes of limitations are generally subject to equitable principles of tolling.”<sup>121</sup>

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114. *Id.* at 18–19.

115. *Bailey v. Glover*, 88 U.S. 342, 349–50 (1875) (“[W]hen the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.”).

116. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey*, 88 U.S. at 347).

117. *Id.*

118. *See Rotkiske*, 589 U.S. at 15; *Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

119. *Wolk v. Olson*, 730 F. Supp. 2d 376, 379 (E.D. Pa. 2010).

120. *Id.* at 378 (quoting *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005)).

121. *Rotella v. Wood*, 528 U.S. 549, 560 (2000).

Because “RICO patterns will involve fraud in many cases,” the Court determined that discovery in this context would undermine the congressional objective to encourage swift, timely actions.<sup>122</sup> The Court drew a helpful comparison to their reasoning for limiting the discovery rule in medical malpractice cases: “[W]e have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.”<sup>123</sup> Courts take extreme caution to not expand the discovery rule in a way that would undermine the core intended purpose of a given statute of limitation.

Beyond fraud or concealment, some courts have also recognized a limited, equity-based discovery rule in cases that involve incapacitation. In *Clifford v. United States*, an action under the Federal Tort Claims Act alleging that the plaintiff had fallen into a permanent coma was not barred by statute of limitations because “the very negligence alleged in the complaint has kept plaintiff from even knowing of his injury.”<sup>124</sup> The limitations period did not begin to run in this case until the plaintiff was appointed a legal guardian.<sup>125</sup> This limited-scope discovery rule operates with the same function as the fraud-discovery rule because a defendant is allegedly at fault for a plaintiff’s inability to assert his claim. Similarly, the Tenth Circuit noted the importance of determining whether a plaintiff’s lack of awareness resulted from the government doctor’s malpractice before allowing application of the discovery rule.<sup>126</sup> These cases, each within the federal medical malpractice context, denote an understanding that incapacitation resulting by fault of the defendant creates an appropriate context for employing the discovery rule. Additionally, the First Circuit took care to note that, in Title VII actions, “there is no absolute rule that would require tolling whenever there is mental disability.”<sup>127</sup>

Courts also have not extended the discovery rule to cases in which parents are already required to act on behalf of their minor children, distinguishing appointment of a guardian as an appropriate point of accrual when the plaintiff could not otherwise know of their injury.<sup>128</sup> This reiterates the cautious approach courts use when establishing appropriateness for discovery-based tolling, even in limited equity-based contexts.

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122. *Id.*

123. *Id.* at 555.

124. *Clifford v. United States*, 738 F.2d 977, 978 (8th Cir. 1984).

125. *Id.* at 979.

126. *Zeidler v. United States*, 601 F.2d 527, 531 (10th Cir. 1979).

127. *Lopez v. Citibank, N.A.*, 808 F.2d 905, 906 (1st Cir. 1987).

128. *Fernandez v. United States*, 673 F.2d 269, 271 (9th Cir. 1982).

### III. DISCUSSION: WHEN DOES A CLAIM ACCRUE UNDER THE COPYRIGHT ACT?

#### A. THE WELL-ESTABLISHED COPYRIGHT DISCOVERY RULE

The federal district courts and courts of appeal, and arguably the United States Congress, have authorized the continued application of the discovery rule to the copyright statute of limitations. But what is the appropriate *scope* of its application to copyright disputes: an expansive, general approach derived from judicial precedent or a limited, equity-based exception to the default incident of injury rule?

Courts are widely and increasingly recognizing a place for the discovery rule in copyright litigation. During oral argument for *Warner Chappell Music, Inc. v. Nealy*, respondents noted that the Circuit courts of appeal have found a discovery rule exists in copyright “for forty years,” and in that time, Congress amended the Copyright Act seventy-nine times.<sup>129</sup> Because courts have continued to apply a discovery rule, some argue that Congress’s intent can be inferred from their lack of action taken to prevent application of the rule.

In 2004, the Ninth Circuit formally adopted application of the discovery rule to the Copyright Act in *Polar Bear Productions v. Timex Corp.*, interpreting the definition of “accrue” to state that “the three-year clock begins upon discovery of the infringement,” granted that the plaintiff was unaware of the infringement *and* “that lack of knowledge was reasonable under the circumstances.”<sup>130</sup> Notably, *Polar Bear* was decided after the Supreme Court decided *TRW*, another case out of the Ninth Circuit, which rejected any default application of a general discovery rule to the FCRA and actions arising under a statute that is otherwise silent.<sup>131</sup> The Third Circuit in *William A. Graham Co. v. Haughey* concluded that “use of the discovery rule comports with the text, structure, legislative history and underlying policies of the Copyright Act.”<sup>132</sup> In *Graham Co.*, the court noted that at the time eight “sister courts of appeals” had applied the discovery rule to civil copyright actions.<sup>133</sup> Since then, the circuit courts have further acknowledged, to some extent, the existence of a discovery rule in

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129. Transcript of Oral Argument, *supra* note 12, at 35.

130. *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (interpreting *Roley v. New World Pictures, Ltd.*, 19 F.3d 479 (9th Cir. 1994)).

131. *TRW Inc. v. Andrews*, 534 U.S. 19, 27–28 (2001).

132. *William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009).

133. *Id.* at 433 (citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits).

copyright.<sup>134</sup> The Seventh Circuit in *Chicago Building Design, P.C. v. Mongolian House, Inc.* stated that “in copyright cases the discovery rule is a common-law gloss.”<sup>135</sup> This case acknowledged *TRW* and other Supreme Court cases outside of copyright by characterizing the incident of injury rule as the traditional default. Moreover, *Nimmer on Copyright*—the authoritative treatise on American copyright law—indicates consensus among appellate courts regarding an equity-based discovery rule in copyright cases of fraud or concealment: “[T]here is no doubt that the copyright statute of limitations is tolled by ‘fraudulent concealment’ of the infringement.”<sup>136</sup>

In contrast, within the Second Circuit is a 2004 case, *Auscape International v. National Geographic Society*, which closely examined the discovery versus injury rule debate in a post-*TRW* context.<sup>137</sup> This case has largely not been relied upon outside of the Southern District of New York and lies in contrast with courts that have applied the discovery rule to copyright including the Second Circuit, but its strong textualist argument against a general discovery rule aligns closely with Supreme Court opinions regarding statutes of limitation in other bodies of law. Operating under the rule from *TRW* that “the starting point in construing a statute must be the text,” Judge Kaplan examined legislative history, statutory language, policy considerations, and case law in determining that the injury rule governs the copyright statute of limitations.<sup>138</sup> The decision did acknowledge that, unlike the FCRA in *TRW*, section 507(b) is “not so illuminating as to Congress’ intent.”<sup>139</sup> Judge Kaplan concluded, based on hearings conducted at the time at which the language of section 507(b) was adopted by Congress, that the limitations period was intended to “accrue” beginning on the date of the infringement.<sup>140</sup> The decision relied partly on the fact that Congress considered whether to adopt equity-based exceptions to the injury rule such as for fraud or concealment.<sup>141</sup> Similarly, the House Judiciary Committee’s decision to not outline equitable exceptions in the statute because “[f]ederal district courts, generally, recognize these equitable defenses anyway,” is

134. The Eleventh Circuit most recently applied the discovery rule to copyright claims. *See Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1330 (11th Cir. 2023) (also noting that courts within the Eleventh Circuit apply the discovery rule of accrual “where the ‘gravamen’ of a copyright claim is ownership” (quoting *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020))).

135. *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 616 (7th Cir. 2014).

136. *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983); *see NIMMER & NIMMER, supra* note 6, at § 12.05(B)(3).

137. *See Auscape Int’l v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 235, 244 (S.D.N.Y. 2004).

138. *Id.*

139. *Id.*

140. *Id.* at 246.

141. *Id.*

arguably supportive of the conclusion in *Auscape*.<sup>142</sup> If Congress did intend the basic rule of accrual to be a discovery rule, considering equitable exceptions would have been unnecessary and redundant.

Largely ignoring the reasoning in *Auscape*, the Second Circuit held in *Psihoyos v. John Wiley & Sons, Inc.* that the discovery rule should be used in civil copyright actions.<sup>143</sup> Drawing upon reasoning of “sister Circuits,” the court in *Psihoyos* distinguished copyright from FCRA actions in *TRW*: “[T]he text and structure of the Copyright Act, unlike the FCRA, evince Congress’s intent to employ the discovery rule, not the injury rule.”<sup>144</sup> Therefore, the federal circuit and district courts widely approve of the discovery rule for accrual in copyright, creating a stark contrast with Supreme Court reasoning on the same topic in other bodies of law.<sup>145</sup>

### 1. Special Considerations for Continuous Infringement

Oftentimes in the copyright context, infringement and the injuries resulting from an act of infringement are not confined to a singular identifiable moment in time. For example, if an image that infringes on someone’s copyright is published by a news company in multiple online articles at different times, it would constitute a continued infringement. Cases of continuous infringement further complicate attempts to define the period of accrual through questions regarding what acts can be included and are recoverable as damages. There were initially two methods of measuring the three-year statutory period: the “continuing wrong” and the “separate-accrual” rules.<sup>146</sup>

Under a continuing wrong approach, the moment of injury up until the final act of infringement is treated as a single, undivided whole, recoverable in its entirety if timely. In *Taylor v. Meirick*, the Seventh Circuit articulated the continuing wrong approach: “[T]he statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with.”<sup>147</sup> This approach is notably problematic because it encourages plaintiffs who are aware that their copyright has been infringed upon to wait toward the end of the limitations period in an effort to maximize recoverable damages. Although this is not applicable to all cases, generally as more time passes, a continuing infringer accumulates a larger benefit, thus increasing actual

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142. S. REP. NO. 85-1014, at 3 (1957) (quoting the House Judiciary Committee Report).

143. See *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014).

144. *Id.* at 124.

145. See *Rotkiske v. Klemm*, 589 U.S. 8, 15 (2019); *Gabelli v. SEC*, 568 U.S. 442, 449 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

146. NIMMER & NIMMER, *supra* note 6, at § 12.05(B)(1).

147. *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983).

damages and profits. This incentive is contrary to the legislative purposes articulated by Congress when enacting the copyright civil statute of limitations in 1957.<sup>148</sup> A factual comparison denoting this problematic implication was not present in *Taylor* because the case involved intentional concealment and called for application of the discovery rule.<sup>149</sup> The courts over time disfavored the continuing wrong approach in causes of action for infringement,<sup>150</sup> and by 2014 the Supreme Court embraced the separate accrual rule.<sup>151</sup>

The separate accrual rule treats each unique act of infringement as distinct points of accrual, creating a rolling look back period of three years from the date the complaint is filed. This approach to continuing infringement cases was adopted in *Roley v. New World Pictures, Ltd.*, in which the Ninth Circuit held that “an action may be brought for all acts that accrued within the three years preceding the filing of the suit.”<sup>152</sup> Because a statute of limitations period is a restriction on the remedy, not the right, the limitations period in a continuous infringement ought to run from the last instance of that infringing conduct, not the first. In other words, the separate accrual approach does not preclude an entire action if its initial infringing act falls outside of the time limitation period. Accrual in copyright looks back from the point at which a complaint is filed.

#### B. SUPREME COURT WEIGH-IN: PUSHBACK OR SILENT AUTHORIZATION?

The Supreme Court has specifically clarified the copyright statute of limitations in two cases: *Petrella v. Metro-Goldwyn-Mayer, Inc.*<sup>153</sup> and *Warner Chappell Music, Inc. v. Nealy*.<sup>154</sup> Both cases have declined to directly answer the question of whether an injury rule or discovery rule governs the statute of limitations in a basic cause of action—one without an obvious demand to account for equitable considerations—under the Copyright Act. This silence, or lack of clarification, on the issue has impliedly authorized appellate courts to apply the discovery rule beyond the traditional equity-based tolling contexts.

148. Consideration was given to concerns for uniformity and fairness. See S. REP. NO. 85-1014, at 2-3 (1957).

149. See *Taylor*, 712 F.2d at 1119.

150. NIMMER & NIMMER, *supra* note 6, at § 12.05(B)(1)(b) (citing *Stone v. Williams*, 970 F.2d 1043, 1050 (2d Cir. 1992)).

151. “Under the Act’s three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is insulated from liability for earlier infringements of the same work.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014) (citing NIMMER & NIMMER, *supra* note 6, at § 12.05(B)(1)(b)).

152. *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994).

153. *Petrella*, 572 U.S. 663.

154. *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135 (2024).

1. Axing the Doctrine of Laches: *Petrella v. Metro-Goldwyn-Mayer, Inc.*

In a 6–3 decision for the petitioner and majority opinion authored by Justice Ginsburg, the Court held that laches “cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window.”<sup>155</sup> Laches is an equitable doctrine that allows a defendant to argue that the plaintiff unfairly delayed in bringing the action and the court should refuse to grant relief.<sup>156</sup> The Court went further to state that “[a]s to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff.”<sup>157</sup> The question presented in *Petrella* is adjacent to the ultimate discovery rule question, and was partially clarified by *Warner Chappell*.

The facts of this case are essential to contextualizing the scope of its holding. The case centers around the film “Raging Bull” directed by Martin Scorsese, depicting the life of boxer Jake LaMotta.<sup>158</sup> LaMotta worked with his friend Frank Petrella to create two screenplays and a book telling his life story.<sup>159</sup> In 1978, a subsidiary of Metro-Goldwyn-Mayer, Inc. (“MGM”) acquired motion picture rights to both screenplays and the book and subsequently released *Raging Bull* in 1980, which became widely successful.<sup>160</sup> Frank Petrella died the following year, and his “renewal rights reverted to his heirs, who could renew the copyrights unburdened by any assignment previously made by the author.”<sup>161</sup> As stated above, the right to renew a copyright only applies to works created prior to the 1976 Copyright Act, which eliminated the renewal requirement and made the copyright protection a bit more author-friendly.

The petitioner in the case was Paula Petrella, Frank Petrella’s daughter, who remained the sole owner of the copyright in the 1963 screenplay following a timely renewal in 1991.<sup>162</sup> Years later, Petrella informed MGM that “[e]xploitation of any derivative work” infringed on the copyright, and MGM denied the validity of these claims.<sup>163</sup> In 2009, Petrella filed suit in the U.S. District Court for the Central District of California, alleging MGM infringed and continued to infringe on her copyright by “using, producing, and distributing *Raging Bull*,” a derivative work.<sup>164</sup> Petrella, recognizing the

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155. *Petrella*, 572 U.S. at 667.

156. *Estoppel by Laches*, BLACK’S LAW DICTIONARY (12th ed. 2024).

157. *Petrella*, 572 U.S. at 667–68.

158. *Id.* at 673.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 674.

163. *Id.*

164. *Id.*

statute of limitations three-year look-back period, only sought relief for infringing acts since January 6, 2006.<sup>165</sup> MGM then moved for summary judgement on grounds that included the equitable doctrine of laches due to “Petrella’s 18-year delay, from the 1991 renewal of the copyright on which she relied, until 2009, when she commenced suit.”<sup>166</sup> Both the district court and the Ninth Circuit dismissed the case under the doctrine of laches due to unfair expectations-based prejudice on the defendant who, in those 18 years, “made significant investments in exploiting the film.”<sup>167</sup>

In evaluating this question of whether laches may be invoked to bar remedies in a copyright infringement action, the Supreme Court stated that the doctrine of laches was originally used in state statutes of limitations prior to the 1957 amendment to the copyright statute of limitations, noting that such doctrine was “ ‘merely filling a legislative hole’ ” and Congress “filled the hole” with the three-year look-back limitations period.<sup>168</sup> The majority then defined the point of accrual: “A copyright claim thus arises or ‘accrue[s]’ when an infringing act occurs.”<sup>169</sup> The majority then employed the “widely recognized” separate-accrual rule to demonstrate that “each infringing act starts a new limitations period.”<sup>170</sup> For instances of continuing infringement, the Court stated that the limitations period allows plaintiffs to, during the copyright term, “gain retrospective relief running only three years back from the date the complaint was filed.”<sup>171</sup> The majority opinion did not fault a plaintiff for deferring suit “until she [could] estimate whether litigation is worth the candle,” noting that the right to challenge infringement under the separate-accrual rule does not demand complete immediacy.<sup>172</sup> In rejecting reasoning for laches due to potential evidentiary prejudice, the Court cited to the fact that Congress intended to allow copyright renewal rights to pass to heirs and “must have been aware that the passage of time and the author’s death could cause a loss or dilution of evidence.”<sup>173</sup>

In 2017, the Supreme Court evaluated the doctrine of laches in the context of the patent statute of limitations.<sup>174</sup> The Court drew upon its

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165. *Id.* at 674–75.

166. *Id.* at 675.

167. *Id.* at 675–76.

168. *Id.* at 670, 680, 681 (quoting *Teamsters & Emps. Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002)). The Court also noted that “laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation.” *Id.* at 678.

169. *Id.* at 670.

170. *Id.* at 671 (citing *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992)).

171. *Id.* at 672.

172. *Id.* at 683.

173. *Id.*

174. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 331

reasoning in *Petrella* in holding that the equitable doctrine of laches cannot be invoked in an action brought under the United States Patent Act because Congress elected to enact a specific statute of limitations period.<sup>175</sup> This case noted that *Petrella* spoke to a separation of powers issue due to the fact that Congress provided for a definitive rule when an action may be considered timely.<sup>176</sup> The Court's reasoning regarding the doctrine of laches as applied to the copyright statute of limitations had a direct impact on the availability of the laches defense for patents—a similar, but distinct body of law—based on the language of the statute.

Beyond the doctrine of laches context, *Petrella* calls into question cases involving continuing infringement in which the discovery rule is present. *Petrella* left open the question of whether a blamelessly ignorant plaintiff who satisfies the discovery rule could recover for damages incurred more than three years before the date of filing suit. On its face, the answer appears to be in the negative. The Court clarified that the trigger for infringement is “an infringing act committed three years back from the commencement of suit,” not the initial act of infringement itself.<sup>177</sup> However, the discovery rule question was and could not have been answered by the facts presented in *Petrella* because the plaintiff was not seeking to recover under the discovery rule. Ten years later, a new case provided some clarity regarding *Petrella*'s somewhat perplexing ruling.

2. Removing the Separate Damages Bar: *Warner Chappell Music, Inc. v. Nealy*

In a 6–3 decision with a majority opinion authored by Justice Kagan, the Supreme Court held that there is no separate bar to recovery of damages for an otherwise timely infringement action.<sup>178</sup> The Court “assume[d] without deciding” that a copyright claim is timely if it meets the discovery rule.<sup>179</sup> Despite the Court limiting the scope of the question presented to a purely damages-based issue, the oral arguments and amicus curiae briefs submitted in support of the parties focused heavily on the discovery rule question.<sup>180</sup> For instance, counsel for petitioner noted that “there is no

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(2017).

175. *Id.* at 331–33.

176. *Id.* at 334.

177. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014).

178. *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1137 (2024).

179. *Id.*

180. See Transcript of Oral Argument, *supra* note 12, at 9–17, 35; Brief of Southwestern L. Student Krystine Cavazos et al. as Amici Curiae in Support of Petitioners at 4–7, *Warner Chappell*, 144 S. Ct. 1135 (No. 22-1078) [hereinafter Brief of Southwestern L. Student]; Brief of the Recording Indus. Ass'n of Am. & Nat'l Music Publishers' Ass'n as Amicus Curiae in Support of Petition for a Writ of Certiorari at 2, *Warner Chappell*, 144 S. Ct. 1135 (No. 22-1078) [hereinafter Brief of the Recording Indus. Ass'n

consensus in the courts of appeals about the scope of the discovery rule,” but there “is consensus about the existence of a discovery rule.”<sup>181</sup> Additionally, amicus curiae briefs addressed multiple sides of the debate: a petition by the National Society of Entertainment and Arts Lawyers argued in favor of a general discovery rule,<sup>182</sup> the Recording Industry Association of America articulated the circuit split and requested resolution of the conflict,<sup>183</sup> and the United States Chamber of Commerce argued that precedent and policy considerations weigh against the injury rule.<sup>184</sup> The decision regarding damages and the brief dissenting opinion’s ultimate focus on the discovery rule question nonetheless have implications for determining the appropriate point of accrual.

The facts of the case begin in 1983 when plaintiff-respondent Sherman Nealy formed a “short-lived music venture” called Music Specialist, Inc. with Tony Butler in which the two collaborators recorded and released the works at issue.<sup>185</sup> The venture dissolved and Nealy subsequently went to prison for drug-related offenses, serving two separate terms from 1989 to 2008 and then from 2012 to 2015.<sup>186</sup> During Nealy’s incarceration and without his knowledge, Butler entered an agreement to license works from the Music Specialist catalogue with defendant-petitioner Warner Chappell Music, Inc.<sup>187</sup> For example, one song from the catalogue was interpolated in the song “In the Ayer” by Flo Rida, a commercially successful release that reached the top ten of the Billboard chart, sold “millions of copies,” and was licensed to several television shows.<sup>188</sup> After his release from prison in 2015, Nealy filed this lawsuit against Warner Chappell in 2018, seeking damages and profits for infringing conduct dating back to 2008.<sup>189</sup> Warner Chappell did not challenge Nealy’s assertion that the discovery rule governed his infringement claims, but the label instead argued he could only recover for

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of Am. & Nat’l Music Publishers’ Ass’n].

181. Transcript of Oral Argument, *supra* note 12, at 9.

182. Brief of Amicus Curiae Nat’l Soc’y of Ent. & Arts Laws. in Support of Respondents at 2, *Warner Chappell*, 144 S. Ct. 1135 (No. 22-1078) (arguing that the copyright statute of limitations “begins to run when an artist discovers, or reasonably should have discovered, an infringement”).

183. Brief of the Recording Indus. Ass’n of Am. & Nat’l Music Publishers’ Ass’n, *supra* note 180, at 4.

184. Brief of the Chamber of Com. of the U.S. of Am. as Amicus Curiae in Support of Petitioners at 3, 5, *Warner Chappell*, 144 S. Ct. 1135 (No. 22-1078) (“The Copyright Act’s statute of limitations makes no reference to a discovery rule. As this Court has made clear, that means there is no discovery rule.”).

185. *Warner Chappell*, 144 S. Ct. at 1137.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

damages occurring in the three years prior to filing suit.<sup>190</sup> For this reason, the validity of the discovery rule to copyright actions did not fall within the scope of the question presented to the Supreme Court.

The district court in Florida sided with Nealy, relying on the Second Circuit decision in *Sohm v. Scholastic, Inc.*, creating a separate damages bar for old, timely infringement actions.<sup>191</sup> The Eleventh Circuit, assuming Nealy's claims were timely under the discovery rule, reversed the district court and "reject[ed] the notion of a three-year damages bar on a timely claim," noting that this reasoning "would gut the discovery rule by eliminating any meaningful relief."<sup>192</sup> On appeal, the Eleventh Circuit relied instead on a Ninth Circuit decision, *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, which stated that a timely claim under the discovery rule may obtain retrospective relief even if it occurred more than three years prior to the filing of the lawsuit.<sup>193</sup> The Supreme Court in *Warner Chappell* resolved the *Sohm-Starz* circuit split by adopting the Ninth Circuit's approach.<sup>194</sup> The Court reasoned that "[i]f any time limit on damages exists, it must come from the Act's remedial sections. But those provisions likewise do not aid a long-ago infringer."<sup>195</sup> Because no statutory language existed that limited monetary recovery, a timely copyright owner is free to seek actual damages and profits.<sup>196</sup> The Court criticized the Second Circuit's reasoning for imposing a damages bar as "self-defeating" because that circuit recognizes a discovery rule but essentially takes away any meaningful value from it.<sup>197</sup> Thus, current law regarding damages recoverable under the Copyright Act for continuing infringement can extend beyond the three-year lookback period, but only if the discovery rule applies within the facts of the case and is properly satisfied when the action commences.

Perhaps the most confusing aspect of *Warner Chappell* is that it, on the surface, appears to contradict copyright precedent favoring the separate-accrual rule in cases of continuing infringement. Both *Petrella* and *Warner*

190. *Id.* at 1138.

191. *Id.* (citing *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 51–52 (2d Cir. 2020)).

192. *Id.* (quoting *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1334 (11th Cir. 2023)).

193. *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022).

194. *Warner Chappell*, 144 S. Ct. at 1137; Caroline Gallo, Note, *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, 214–15 (2024).

195. *Warner Chappell*, 144 S. Ct. at 1139.

196. See 17 U.S.C. § 504.

197. *Warner Chappell*, 144 S. Ct. at 1139.

*Chappell* effectively adopt a rolling approach to continuing infringement.<sup>198</sup> The damages bar created in *Sohm* took the *Petrella* holding “out of context,” by applying it beyond a situation in which the plaintiff had “no timely claims for infringing acts more than three years old.”<sup>199</sup> However, the Court read *Warner Chappell* in harmony with *Petrella* through the assumption that the discovery rule did in fact apply.

### 3. Implicit Authorization

The current state of the copyright statute of limitations appears to implicitly authorize application of the discovery rule. The dissenting opinion in *Warner Chappell*, authored by Justice Gorsuch and joined by Justice Thomas and Justice Alito, provides an interesting window into the potential direction the Court may go if it decides to take up the direct question regarding the role of the general statutory-based discovery rule application in copyright actions. The dissent argued that the entire decision in *Warner Chappell* is a “dead letter” due to the failure of the Court to address the “logically antecedent question” of whether the general discovery rule has any proper place in the Copyright Act.<sup>200</sup> Justice Gorsuch stated that “the [Copyright] Act almost certainly does not tolerate a discovery rule,” and that he would have dismissed the case as “improvidently granted.”<sup>201</sup> In citing another part of the *Petrella* decision, the dissent pointed out that the Supreme Court “ordinarily” states that the point of accrual is when “a plaintiff has a complete and present cause of action,” equating this to “when the plaintiff can file suit and obtain relief.”<sup>202</sup> The dissenting opinion further stated, citing to *Rotkiske* and *TRW*, that the incident of injury rule is the “‘standard rule’” for interpreting statutes of limitation, and “[u]nless the statute at hand directs otherwise,” the discovery rule should be restricted to cases of fraud or concealment.<sup>203</sup> The dissent argued that the Court has explicitly stated the discovery rule is not “‘applicable across all contexts’” and has “long warned lower courts” against expansive application of the discovery rule.<sup>204</sup> This dissenting opinion sharply criticizes any further entertainment of the general discovery rule in copyright, finding it unsupported by Supreme Court precedent regarding statutes of limitations and unsupported by the language and intent of the Copyright Act.

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198. Sundine, *supra* note 46, at 54; *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).

199. *Warner Chappell*, 144 S. Ct. at 1140.

200. *Id.* (Gorsuch, J., dissenting).

201. *Id.* at 1140–41 (Gorsuch, J., dissenting).

202. *Id.* at 1141 (Gorsuch, J., dissenting) (alterations and internal quotation marks omitted) (quoting *Petrella*, 572 U.S. at 670).

203. *Id.* (Gorsuch, J., dissenting) (quoting *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019)).

204. *Id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001)).

While *Warner Chappell* was being decided, the Supreme Court was presented directly with this “logically antecedent” discovery rule question. A case arising out of the Fifth Circuit, *Martinelli v. Hearst Newspapers, LLC*, presented the question of “whether the Copyright Act’s statute of limitations for civil claims incorporates a so-called ‘discovery rule’ that does not appear in the statute.”<sup>205</sup> On May 20, 2024, just eleven days following the *Warner Chappell* decision, the Supreme Court denied certiorari in *Martinelli*.<sup>206</sup> The Fifth Circuit formally recognized that the discovery rule governs accrual in copyright actions in *Grafer v. Mid-Continent Casualty Co.* in 2014.<sup>207</sup> The *Martinelli* case centers around seven photographs taken by plaintiff-respondent Antonio Martinelli of Lugalla, Ireland, also known as the “Guinness Castle,” which were commissioned by Sotheby’s International Realty when the property was listed for sale in 2015.<sup>208</sup> Defendant-petitioner Hearst Newspapers used the photographs in a 2017 web-only article, published on several news websites.<sup>209</sup> Martinelli did not immediately discover the use of his photographs—his earliest discovery was in 2018—and Hearst stipulated that he could not have discovered the infringing use with reasonable diligence at any earlier point in time.<sup>210</sup> Martinelli brought suit in 2021, “within three years of discovering the infringements but more than three years after the infringements occurred.”<sup>211</sup> Based on *Grafer*, the Fifth Circuit affirmed the district court decision that concluded Martinelli’s claims were timely brought.<sup>212</sup> Further, the Fifth Circuit reasoned that *Petrella* and *Rotkiske* did not “unequivocally overrule” their use of the discovery rule in copyright cases because they were restricted to the specific contexts of the case and statute at issue.<sup>213</sup>

Similarly, the Supreme Court recently denied certiorari in *Michael Grecco Productions, Inc. v. RADesign, Inc.* on June 16, 2025.<sup>214</sup> Plaintiff

205. Petition for Writ of Certiorari at 2, *Hearst Newspapers, L.L.C. v. Martinelli*, 144 S. Ct. 2561 (2024) (No. 23-474).

206. See *Hearst Newspapers*, 144 S. Ct. 2561.

207. *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 233 (5th Cir. 2023) (citing *Grafer v. Mid-Continent Cas. Co.*, 756 F.3d 388, 393 (5th Cir. 2014)).

208. *Id.*

209. *Id.*

210. *Id.* The opinion explains the case timeline regarding infringement: “Martinelli first discovered the Houston Chronicle article on November 17, 2018. Between September 2019 and May 2020, Martinelli discovered the article on the websites of the San Francisco Chronicle, the Times Union, the Greenwich Time, and The Middletown Press. On February 19, 2020, Martinelli discovered the article on the Elle Décor website.” *Id.*

211. *Id.* at 234.

212. *Id.*

213. *Id.* at 237.

214. See *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144 (2d Cir. 2024), *cert. denied*, 2025 U.S. LEXIS 2369, No. 24-768 (S. Ct. June 16, 2025).

Michael Grecco Productions alleged that defendant Ruthie Davis used copyrighted photos without authorization in connection with her designer shoe business.<sup>215</sup> The district court refused to apply the discovery rule based on the plaintiff's "sophistication," concluding that they should have discovered the infringement.<sup>216</sup> The Second Circuit reversed and rejected the " 'sophisticated plaintiff' exception to the discovery rule," and the Supreme Court subsequently declined to review the case.<sup>217</sup> Like in *Martinelli*, petitioners in this case sought clarification from the Court on whether the discovery rule applies in copyright statutes of limitations. This additional reluctance of the court to take up the direct discovery rule question indicates that the Justices may want to see how the lower courts approach the issue following *Warner Chappell*. Further, there may be disagreement among the Justices as to whether continued allowance of the discovery rule to be applied as currently done by lower courts is an issue at all, which suggests insufficient support by members of the Court to grant certiorari.<sup>218</sup>

Because the Supreme Court has chosen not to decide the issue of the discovery rule in copyright, despite opportunity to do so, the Court has effectively silently authorized application of the discovery rule, at least for the time being. Some practitioners speculate that the decision in *Warner Chappell* will encourage more copyright actions to be brought under the discovery rule due to the availability of unlimited retroactive recovery if successful.<sup>219</sup> In the meantime, *Warner Chappell* put an end to an immediate concern for forum shopping and incentivized infringement that was a consequence of the damages-based circuit split under *Sohm*.<sup>220</sup> Because this

215. *Id.* at 147.

216. *Id.*

217. *Id.* at 148.

218. It is possible that only Justice Gorsuch, Justice Alito, and Justice Thomas would have voted in favor of hearing the case, but the votes of four Justices are required to grant a petition for writ of certiorari. Tyler T. Ochoa, *Warner Chappell Music, Inc. v. Nealy and the Copyright Act's Statute of Limitations*, 24 CHI.-KENT J. INTELL. PROP., 2025, at 98, 136.

219. Fatima Kassem & Rachel Smith, *The Broad Implications of Warner Chappell Music, Inc. v. Nealy on Copyright Damage Recovery*, BROOKS KUSHMAN (May 10, 2024), <https://www.brooks-kushman.com/insights/the-broad-implications-of-warner-chappell-music-inc-v-nealy-on-copyright-damage-recovery> [https://perma.cc/3E7M-S9B5] (noting that the case "significantly expands the potential for recovery in copyright cases where infringements might go unnoticed for long periods"); Christina J. Moser, Chad A. Rutkowski & Amanda M. (Spo!) Spoto, *Warner Chappell Music, Inc. v. Nealy: Supreme Court Allows Retrospective Copyright Damages Beyond 3 Years Based on Discovery Rule*, BAKERHOSTETLER (June 3, 2024), <https://www.ipintelligencereport.com/blogs/warner-chappell-music-inc-v-nealy-supreme-court-allows-retrospective-copyright-damages-beyond-3-years-based-on-discovery-rule> [https://perma.cc/9MWA-JA76].

220. Eileen McDermott, *DIG, Dogs and Bad Wine: Justices Float Scrapping Warner Chappell to Consider Alternate Petition on 'Discovery Accrual Rule' for Copyright*, IPWATCHDOG (Feb. 21, 2024, at 14:15), <https://ipwatchdog.com/2024/02/21/dig-dogs-bad-wine-justices-float-scrapping-warner-chappell-consider-alternate-petition-discovery-accrual-rule-copyright> [https://perma.cc/87GM-6SR4].

question remains unanswered, practitioners also point to the value of preserving all defenses to copyright infringement actions for clients.<sup>221</sup>

C. PROPOSING A FRAMEWORK FOR COPYRIGHT: WHY THE SUPREME COURT SHOULD NOT ANSWER THE DISCOVERY RULE QUESTION

1. A Marriage of Precedents

The only interpretation of “accrual” that balances the existing divide in judicial opinion between the Supreme Court and Circuit Courts is narrowing the scope of the discovery rule to the equity-based framework applicable to limited contexts such as fraud or concealment.<sup>222</sup> This framework proposes a middle ground between Supreme Court pushback against expansive application of the discovery rule and the longstanding, more than forty years,<sup>223</sup> of approval for application of the discovery rule by federal appellate courts in copyright cases. Should the Supreme Court decide to take this issue head-on, as advocated by Justice Gorsuch in his dissent to *Warner Chappell*, they are unlikely to find that a statutory-based general discovery rule exists under the Copyright Act due to an absence of (1) “plain and unambiguous statutory language”<sup>224</sup> or (2) clear legislative intent.<sup>225</sup> When looking exclusively at Supreme Court jurisprudence regarding the discovery rule in general, support for an injury rule default is even stronger. Statutory language and Supreme Court precedent point toward the discovery rule as “an equitable doctrine,” as defined in *Rotkiske*, indicating its appropriate role is and should be limited to equitable contexts like fraud or concealment.<sup>226</sup> As an example, the Court stated that “the most natural reading” of 42 U.S.C. § 2462—which defines its statute of limitations “from the date when the claim first accrued” much like the language in the Copyright Act’s section 507(b)—is to define accrual from the point at which the conduct occurs.<sup>227</sup>

The language that stipulates the civil copyright limitations period specifies that it begins to run “after the claim accrued,” which, when placed next to the language used in section 507(a) for criminal actions—“after the cause of action arose”—creates a distinction.<sup>228</sup> The assumption that the Copyright Act tolerates a discovery rule in civil actions is reasonable when

221. Moser et al., *supra* note 219.

222. Brief of Southwestern L. Student, *supra* note 180, at 4.

223. McDermott, *supra* note 220.

224. Intel Corp. Inv. Pol’y Comm. v. Sulyma, 589 U.S. 178, 184 (2020) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

225. See *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019); *Gabelli v. SEC*, 568 U.S. 442, 449 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

226. *Rotkiske*, 589 U.S. at 15.

227. *Gabelli*, 568 U.S. at 447–48 (quoting 28 U.S.C. § 2462).

228. 17 U.S.C. § 507(a)–(b).

compared to the statute of limitations for criminal copyright actions in which Congress clearly intended the time bar to run from the point of infringement, the moment when the copyright owner was injured. On one hand, this difference in language reflects the prioritization of finality and certainty in criminal cases. On the other, Congress's failure to define accrual may leave room for the courts to read in a broad- or equity-based interpretation of the discovery rule. The district court decision in *Auscape* utilized this reasoning to reach the opposite conclusion,<sup>229</sup> but the Second Circuit remained unconvinced.<sup>230</sup>

Moving to legislative intent, the congressional weigh-in at the time that the three-year period was adopted reflects a desire to allow a discovery rule in cases that demand traditional equitable principles, namely fraud and concealment. Thus, the *Warner Chappell* dissenting opinion, broadly stating that the Copyright Act "almost certainly does not tolerate a discovery rule," likely intended to limit its scope of application to traditional equitable tolling contexts.<sup>231</sup> Congress specifically addressed this question in 1957 when drafting the civil statute of limitations. The Senate and House agreed that plaintiffs will expect to have available to them the equitable considerations of their local district court.<sup>232</sup> However, the intentional silence in the statute's text and discussion of "equitable" considerations is supportive of a conclusion that the incident of injury rule governs, subject to a limited discovery rule in cases of fraud or concealment. The House Judiciary Committee specifically identified fraud or concealment as a minimal problem in copyright.<sup>233</sup> This acknowledgement lends support to the assumption that any leeway available for a discovery rule at the time was intended for only equity-based situations.

Unlike with the FCRA in *TRW*, the Copyright Act does not mention any specific equitable scenarios that would authorize or dispose of a discovery rule. Because the 1957 Senate and House Reports both have language indicating that the limitations period is subject to equitable considerations, the statutory intent was likely to establish an injury rule, subject to those considerations. Allowing for equitable tolling while also imposing the discovery rule is redundant, because the existence of a general discovery rule renders the inclusion of such equitable exceptions obsolete. Perhaps Congress did not want to exclude tolling in situations outside of fraud or

229. *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 247 (S.D.N.Y. 2004).

230. *See Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022).

231. *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1140 (2024) (Gorsuch, J., dissenting).

232. *See* S. REP. NO. 85-1014, at 3 (1957) (quoting the House Judiciary Committee Report); *see also infra* Section I.C.

233. *See* S. REP. NO. 85-1014, at 3.

concealment if necessary for fairness. However, Congress also assumed that people have an expectation that “equitable consideration[s] of the locality” will apply in court when declining to enumerate applicable equitable situations in the statute.<sup>234</sup>

Moreover, the Supreme Court does not allow for a discovery rule to be read into a statute that is otherwise completely silent on the issue, outside of cases where “humane” policy considerations demand it such as medical malpractice or latent disease.<sup>235</sup> The Court has previously disregarded lower court’s application of the discovery rule when a statute is silent on the issue, specifically to civil RICO actions.<sup>236</sup> The Court, due to its clear precedent in several other bodies of law, may either articulate a limited scope, fraud-based discovery rule or plainly state that the incident of injury rule governs because equitable considerations of fraud or concealment are “read into every federal statute of limitation.”<sup>237</sup> This is an alternative explanation for Congress’s decision to not specify equitable considerations in the copyright statute of limitations. While limiting the discovery rule to equitable exceptions is not sufficient to account for copyright owners who are blamelessly ignorant of their claims, to say that copyright is of the bodies of law better suited to a general discovery rule because it cannot appropriately compensate plaintiffs is not wholly convincing and lacks support from both the statute itself and from Supreme Court reasoning. However, closer examination of the policies underlying such an argument provides necessary insight.

## 2. Fitting the Unique Demands of Copyrightable Works

Drawing upon language from *TRW*, does copyright infringement “‘cry for a discovery rule’ ”<sup>238</sup> in a similar enough way to other bodies of law such as medical malpractice? Copyright and its policy considerations are arguably not unique enough to demand divergence from the injury rule default present in most other legal contexts. Copyright, however, protects distinct rights that serve the specific ends of promoting creation of original and artistic works. The intent of copyright protection is to encourage creation of expressive works for the greater public benefit, which has authorial and utilitarian considerations. History of copyright stemming from the Statute of Anne emphasizes artist rights and protections, but the American approach also

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234. *Id.*

235. See, e.g., *Quinton v. United States*, 304 F.2d 234, 241 (5th Cir. 1962); *United States v. Kubrick*, 444 U.S. 111, 122 (1979); *Urie v. Thompson*, 337 U.S. 163, 170 (1949); see also *infra* Section II.B.2.

236. See *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001) (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000)); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997).

237. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946).

238. *TRW*, 534 U.S. at 37 (quoting *Rotella*, 528 U.S. at 555).

places much of its value in a utilitarian economic perspective focused on the public domain and limiting monopolies.

Disincentivizing copyright infringement in the creative industries is not a black and white issue, and costly claims of infringement can be counterintuitive to this aim. Limiting the scope of the discovery rule is not necessarily anti-creator. For example, creators can be on both sides of an infringement litigation, like *Warner Chappell* in which both the plaintiff and defendant represented interests of a musical artist.<sup>239</sup> However, because this body of law recognizes the intrinsic importance of protecting rights of individual authors, some authors would greatly benefit from a discovery default, such as independent authors who operate without publishers that ensure proper registration and policing of a work's copyright interest.<sup>240</sup> These interests create a gray area, and neither a prohibition nor a general application of the discovery rule may properly suit copyright law. The injury rule default, subject to equitable exceptions, serves as an effective mechanism to prevent surprise litigation while promoting fairness in extenuating circumstances.

To address the argument that the demands of copyright law are better suited to a discovery rule due to the difficulties owners face in identifying infringement, it is necessary to place policy arguments within the context of other bodies of law. Like the petitioner in *Warner Chappell*, who was incarcerated during the time at which he did not discover the infringement, many facts reveal imperfections with limiting the discovery rule to equitable exceptions for fraud and concealment. Some bodies of law have grappled with incapacitation as an additional exception for tolling,<sup>241</sup> but there remains reluctance to expand for this and for alike contexts. Copyright is not an area of law where "humane" considerations demand tolling like that of life-threatening illnesses that manifested sometime after the occurrence of an injury-causing event.<sup>242</sup>

Furthermore, the idea that copyright infringement is an inherently public act could also support an argument for allowing continued application of the discovery rule. The modern media landscape has dramatically changed beyond what was conceivable in 1957. The internet, streaming services, and social networking platforms have made information extremely accessible. It

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239. *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1137 (2024).

240. *Understanding Author Rights and Publishing Agreements*, UNIV. OF MD. LIBRS., <https://www.lib.umd.edu/research/oss/copyright-basics/understanding-author-rights-and-publishing-agreements> [http://perma.cc/6YKM-7A27].

241. *See, e.g., Clifford v. United States*, 738 F.2d 977, 978 (8th Cir. 1984); *Lopez v. Citibank, N.A.*, 808 F.2d 905, 906 (1st Cir. 1987).

242. *TRW*, 534 U.S. at 37.

is arguably easier than ever both for a copyright owner to know of infringements of their works and for infringers to engage in unauthorized uses of such works. The modern communication landscape similarly makes it easier for a copyright owner to discover an infringing act. However, trade-offs remain because it has become far more challenging to monitor for infringement as a result of the sheer volume of online content. The case, *Wolk v. Olson*, and the inherently public nature of defamation adds to the argument that discovery-based accrual is reserved for contexts in which a plaintiff's injury "is not immediately ascertainable."<sup>243</sup> Copyright infringement is not inherently public to the same extent as defamation, but infringement is largely ascertainable, which was acknowledged by Congress at the time it adopted the three-year limitations period.<sup>244</sup> However, as recognized in *Graham Co.*, Congress could have intended to leave space for application of the discovery rule for cases in which infringement was not public by asking "whether the injured party has 'reasonably prompt notice' of infringement."<sup>245</sup> Further, the violation may not be so public for claims of copyright ownership. In some circuit courts, application of the discovery rule has evolved differently for copyright ownership or authorship disputes and copyright infringement disputes.<sup>246</sup>

The type of notice a copyright owner is charged with is also relevant in some jurisdictions for defining the scope of the discovery rule. Interestingly, the Second Circuit decision in *Michael Grecco* rejected the idea that the discovery rule is unavailable to "sophisticated" plaintiffs.<sup>247</sup> Citing *Psihoyos* and *Warner Chappell*, which both authorize the discovery rule of accrual, the Second Circuit in *Michael Grecco* reasoned that regardless of a party's experience with copyright litigation, they are entitled to application of the discovery rule if it applies to their claim.<sup>248</sup> This decision is dependent upon the circuit's general discovery rule, arguing that placing a limitation on the discovery rule is only appropriate in bodies of law that view discovery as an equitable exception, instead of a general, default rule of accrual.<sup>249</sup> The

243. *Wolk v. Olson*, 730 F. Supp. 2d 376, 378 (E.D. Pa. 2010) (quoting *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005)).

244. See S. REP. NO. 85-1014, at 2 (1957).

245. *William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009) (quoting S. REP. NO. 85-1014, at 2).

246. *Ochoa*, *supra* note 218, at 119–21 (stating that the Third, Sixth, and Ninth Circuits require "express repudiation" to trigger ownership claims; the First, Fifth, and Eleventh Circuits apply a general discovery rule; and "[t]he Second, Seventh, and Tenth Circuits . . . equate[] the two standards").

247. *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 147 (2d Cir. 2024).

248. *Id.* at 152.

249. See *NIMMER & NIMMER*, *supra* note 6, at § 12.05(B)(2) (defining the discovery rule as a claim "arising when the copyright owner learns of the offending conduct"). The "general discovery rule" here refers to when the discovery rule is applied as the default point of accrual; this is to be contrasted with the equitable exception definition that restricts application of a discovery rule to specific contexts, such

Second Circuit in *Michael Grecco* was operating under a default discovery rule and evaluated whether it was appropriate to charge a uniquely situated plaintiff with a different standard of inquiry in its efforts to discover an infringing act based on their experience as a copyright litigant. Although the Supreme Court declined to take up this case, the sophisticated plaintiff exception to the discovery rule is not available in the Second Circuit. However, the opinion's language appears to confirm the position that the discovery rule applies in all copyright claims within the Second Circuit.

To reiterate a basic policy consideration, statutes of limitations are essential if the purpose of protecting any form of intellectual property is to “promote the Progress of Science and useful Arts.”<sup>250</sup> The discovery rule is entirely pro-copyright owner, but it is not necessarily always pro-artist or pro-creative. The phrases “art inspires art” and “nothing comes from nothing” are gimmicky articulations of the very policy arguments that highlight some of the hypocrisy that results from certain infringement actions that may stand to hinder creative expression, which nonetheless are valuable considerations in the discovery rule debate. It is notable that individuals often choose to settle a case with questionable merits due to the costs of litigation, and statutes of limitation are one bar to actions that may be unduly burdensome.<sup>251</sup> The music industry is a prime example of an area of copyright where an injury rule default better accords to policy demands.<sup>252</sup> While the merits of infringement disputes are beyond the scope of this Note, this issue is a small component of the larger statute of limitations conversation. Therefore, depending on the case, scope, and context, the discovery rule of accrual can be both pro-alleged infringer and pro-copyright owner.

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as fraud or concealment.

250. U.S. CONST. art. I, § 8, cl. 8.

251. For example, Ed Sheeran regrets settling the lawsuit over his song “Photograph,” expressing the belief it “opened the floodgates for future claims.” Daisy Yang, *Greed, Legal Battles, and the Future of Music: Ed Sheeran’s Copyright Battle*, EQUAL JUST. PROJECT (July 7, 2023), <https://www.equaljusticeproject.co.nz/articles/greed-legal-battles-and-the-future-of-music-ed-sheerans-copyright-battle2023> [https://perma.cc/N3KF-4CPT]; see also Reese, *supra* note 29, at 133 (discussing innocent infringement). Many infringement actions reach out-of-court settlements, which present both advantages and disadvantages, especially if both parties to the litigation are artists or the authors of the works at issue. Rae Marie Manar, *21 Famous Copyright Infringement Cases that Will Make You Cringe*, COPYRIGHTED (Apr. 23, 2025), <https://www.copyrighted.com/blog/copyright-infringement-cases> [https://perma.cc/4RQB-8K3S].

252. Brief of the Recording Indus. Ass’n of Am. & Nat’l Music Publishers’ Ass’n, *supra* note 180, at 2 (arguing for a limited discovery rule).

### 3. Implications for Other Bodies of Law

Cases decided by the Supreme Court regarding statutes of limitations draw upon one another through shared reasoning and language, leaving the potential for any expansion of the discovery rule to spread outside of the statute at issue in the specific case's question presented. In *Rotkiske*, a case about the FDCPA, Justice Thomas's majority opinion quoted language from Justice Scalia's concurring opinion in *TRW*, a case about the FCRA's statute of limitations period, to state that "[t]his expansive approach to the discovery rule is a 'bad wine of recent vintage,' " holding that the injury-occurrence rule governs.<sup>253</sup> The holdings in *Kubrick* and *Urie* that recognize application of the discovery rule in the special contexts of medical malpractice and latent disease have been cited in multiple decisions that involve determining a statute of limitations point of accrual.<sup>254</sup> Additionally, the Supreme Court in *Holmberg*, a case that involved a suit in equity, held that the statute of limitations does not begin to run in cases involving fraud until the fraud is discovered, which drew upon the reasoning in an old bankruptcy case.<sup>255</sup> Further, the decision in *Petrella* that the doctrine of laches cannot bar claims under the Copyright Act because Congress had enacted a statute of limitations was subsequently applied to the Patent Act in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*.<sup>256</sup>

The Supreme Court may choose to narrowly articulate its decisions regarding statutes of limitations to make clear the holding should apply to only the specific facts at issue, but as demonstrated throughout these cases, the Court is generally consistent in its reasoning across different bodies of law. In a concurring opinion, Judge Murphy of the Sixth Circuit contemplated the unanswered discovery rule question in a case involving a First Amendment retaliation claim and stated, "Although our court has recited the discovery rule in many § 1983 cases, I have my doubts about our approach."<sup>257</sup> The First Amendment and copyright are different bodies of law, but as explored above, the Supreme Court reasoning regarding the discovery rule may impact both.

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253. *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring)).

254. *TRW*, 534 U.S. at 27; see, e.g., *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010).

255. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (citing *Bailey v. Glover*, 88 U.S. 342, 347 (1875)).

256. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 331–32 (2017) (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677–79 (2014)). The Court "spoke in broad terms" in *Petrella* when it stated, "[I]n [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.* at 334 (quoting *Petrella*, 572 U.S. at 679).

257. *Reguli v. Russ*, 109 F.4th 874, 885 (6th Cir. 2024) (Murphy, J., concurring).

Additionally, recent cases involving the copyright statute of limitations disputes following the *Warner Chappell* decision continue to consider application of the discovery rule. In *Foss v. Eastern States Exposition*, the First Circuit declined to toll the limitations period due to the plaintiff's failure to diligently register her copyright.<sup>258</sup> The Seventh Circuit has stated that the *Warner Chappell* decision "did not overturn this circuit's settled adoption of the discovery rule in copyright cases."<sup>259</sup>

The Supreme Court has no immediate need to address the copyright statute of limitations injury versus discovery rule question due to the general consensus among the circuit courts regarding the discovery rule's application to copyright. Following the *Warner Chappell* decision's resolution of the circuit split regarding a bar on damages caused by infringement occurring outside of the three-year statute of limitations period, the risk of forum shopping by plaintiffs has lessened. The current state of affairs provides flexibility to litigants whose claims may rely on application of a discovery rule beyond traditional equitable tolling contexts of fraud or concealment. Addressing the question directly could either force foreclosure of the discovery rule beyond these limited contexts, or risk that an expansion of the discovery rule may impact bodies of law outside of copyright.

### CONCLUSION

The appropriate point of accrual under the Copyright Act's three-year statute of limitations period is undefined by the Supreme Court and the statute itself. On one hand, appellate courts have a well-established history applying the discovery rule to copyright actions. On the other hand, when a statute's text or clear congressional intent does not provide for a discovery rule, the Supreme Court has repeatedly held that the injury rule is the only appropriate method of accrual outside of equitable tolling contexts such as fraud or concealment. This stark contrast between copyright cases and jurisprudence surrounding statutes of limitation in other bodies of law makes the future role of the discovery rule in copyright difficult to predict.

The recent decision in *Warner Chappell Music, Inc. v. Nealy* reduced the risk of forum shopping by allowing retroactive recovery for claims that satisfy the discovery rule and heightening the stakes for damages available to plaintiffs. Currently, every federal appellate court allows for application of the discovery rule, which in turn places the burden on the parties to argue

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258. *Foss v. E. States Exposition*, 149 F.4th 102, 112 (1st Cir. 2025) ("Equitable tolling is available 'in exceptional circumstances' to extend the statute of limitations.") (quoting *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 71 (1st Cir. 2005)).

259. *Motorola Sols., Inc. v. Hytera Commc'ns Corp.*, 108 F.4th 458, 479 (7th Cir. 2024).

whether their specific claim should fall within its scope. Many lower courts will likely interpret this ruling as a continued implied authorization of a general copyright discovery rule. Other interpretations may continue to push back against copyright precedent to align with Supreme Court reasoning in other bodies of law, risking creation of another circuit split down the line.

Regardless, copyright litigation will continue to create cases ripe for review by the Supreme Court that fall squarely within Justice Gorsuch's idea of an "antecedent" discovery versus injury rule question.<sup>260</sup> Whether the Court grants certiorari in such a case is yet to be determined. In the meantime, copyright owners who can satisfy the discovery rule are entitled to collect damages dating all the way back to the initial infringing act. A Supreme Court majority may instead be in favor of adopting a general discovery rule in copyright actions, but reasonable concerns for wider implications arise if the rule is not carefully articulated to only apply in the copyright context.

Both the Copyright Act's text and statute-of-limitations precedent in other bodies of law are supportive of an injury rule method of accrual in copyright litigation, subject to equitable tolling exceptions. Recall the hypothetical from the Introduction: the injury rule framework, subject to equitable tolling, would bar the photographer from recovery because the action was brought over three years after the infringing act occurred. The magazine that relied in good faith on the public figure's dubious ownership of the photos would prevail over the original author of the works, prioritizing policy interests that protect against surprise litigation. This fictional fact pattern is a reminder of the unsatisfying consequences that are inherent to statutes of limitation. However, this framework aligns with congressional intent and avoids the potential for an overly restrictive construction of the discovery rule. It simultaneously prevents unintended consequences on bodies of law outside of copyright, striking a balance between the "bad wine" and the unique demands of copyright law.

Copyright cases have continued to wear away at the injury rule default. Maintaining the status quo for the copyright statute of limitations point of accrual allows lower courts to continue to rely on a general discovery rule, which enables copyright owners to pursue their claims with more leniency. Although contrary to the Supreme Court's injury rule default articulated in other bodies of law, this trend is helpful to plaintiffs operating within the modern media landscape and comports with historical application of the general discovery rule to copyright actions by lower courts. The lack of clarification by the Supreme Court provides some flexibility to litigants that

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260. Warner Chappell Music, Inc. v. Nealy, 144 S. Ct. 1135, 1140 (2024) (Gorsuch, J., dissenting).

would not otherwise be available if the court rejected general application of the discovery rule. Lack of Supreme Court intervention on the matter also can maintain stability for statutes of limitations in other bodies of law, avoiding impact from formal expansion or rejection of the discovery rule.