No. 22-1078

In The Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC., AND ARTIST PUBLISHING GROUP, LLC, PETITIONERS,

v.

SHERMAN NEALY AND MUSIC SPECIALISTS, INC., RESPONDENTS.

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

BRIEF OF SOUTHWESTERN LAW STUDENT KRYSTINA L. CAVAZOS, AND PROFESSORS ORLY RAVID, ROBERT C. LIND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Copyright Act's statute of limitations for civil actions, 17 U.S.C. 507(b), precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners. Orly Ravid is an associate professor at Southwestern Law School and the Director of the Biederman Entertainment and Media Law Institute. Robert C. Lind is a professor emeritus at Southwestern Law School and the author of numerous treatises on copyright and entertainment law. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the Journal of International Media & Entertainment Law, published by the Biederman Institute in cooperation with the American Bar Association. Amicus Krystina L. Cavazos is an upper-division J.D. candidate at Southwestern Law School with an extensive academic and professional interest in entertainment and copyright law. Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the correct and consistent

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[1] Amici provided 10-day notice of intent to file this brief to counsel of record for the parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the cost of preparing this brief. (The school is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

interpretation of copyright law. Amici share a strong interest in the interpretation and application of the Copyright Act's statute of limitations regarding limitations on retrospective relief following the Eleventh Circuit's decision in *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023).

SUMMARY OF THE ARGUMENT

The parties, in this case argue whether the Copyright Act's statute of limitations bars recovery of retrospective relief for acts that occur more than three years prior to the filing of the lawsuit. In support of Petitioners Warner Chappell Music, this brief argues that, as this Court has already dictated in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the discovery rule is not the default rule of accrual for federal claims.

This Court found in *TRW Inc.* that there is no general federal discovery rule that can be applied to all statutes of limitations. *Id.*, at 28. Furthermore, this Court made note that the discovery rule has typically been applied to cases involving latent disease and medical malpractice. *Id.*, at 27. The application of the injury rule in *TRW Inc.* is consistent with this Court's opinion in *Petrella v. MGM*, 572 U.S. 663, 671-672, 674-675 (2014), where it discussed at length the injury rule as a rule for accrual under the Copyright Act's statute of limitations. Nevertheless, lower courts have consistently failed to apply *TRW Inc.* and *Petrella* to copyright infringement claims by continuing to frequently utilize the discovery rule.

The legislative history of the 1976 Copyright Act supports the notion that Congress did not intend for a general discovery rule to apply to the Copyright Act's statute of limitations. S. Rep. No. 85-1014, at 2 (1957). The only equitable tolling discussed by Congress was situations involving fraudulent concealment, and it was determined, given the nature of art, that those cases would be minimal. *Id.*, at 2-3. Furthermore, Congress had the opportunity to change the language to include a discovery rule when enacting the Copyright Act of 1976 but left the language largely unchanged. H.R. Rep. No. 94-1476, pt. 2, at 164 (1976).

Additionally, courts that apply the discovery rule do so inconsistently, which has resulted in a notable circuit split. The Ninth and Eleventh Circuits have found that when applying the discovery rule, a plaintiff can recover retrospective relief for an occurrence outside the three-year statute of limitations period. *Starz Ent., LLC v. MGM Domestic TV Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022); *Nealy*, 60 F.4th at 1331. Whereas the Second Circuit has applied the discovery rule but limited retrospective relief to the three years prior to the filing of the claim. *Sohm v. Scholastic Inc.*, 959 F.3d 39, 51 (2d Cir. 2020). This circuit split has incentivized forum shopping by attorneys needing to be the best advocates for their clients and avoid malpractice claims by filing in the forum with the best available remedies for the plaintiff.

ARGUMENT

I. THIS CASE IS RIPE FOR THIS COURT TO CLARIFY WHETHER THE DISCOVERY RULE IS APPLICABLE TO THE COPYRIGHT ACT'S STATUTE OF LIMITATIONS

A. THE DISCOVERY RULE IS NOT THE DEFAULT RULE FOR FEDERAL CLAIMS

This Court has not applied a general discovery rule to every federal statute of limitations. *TRW Inc.*, 534 U.S. at 27. In *TRW Inc.,* the plaintiff sued, claiming *TRW Inc.* violated the Fair Credit Reporting Act (FCRA) when it unknowingly disclosed her credit information to unauthorized parties. *Id.*, at 24. The plaintiff did not become aware of the injury until sometime later when she tried to refinance her mortgage. *Id.* The District Court ruled that two of the plaintiff's claims were outside the two-year statute of limitations because the claims accrued at the time of the injury. *Id.*, at 25. The Ninth Circuit on appeal held that the claims were not time-barred as there was a general discovery rule for federal claims, and the statute of limitations began to run at the time the plaintiff discovered they had been injured. *Id.*, at 26.

This Court expressly repudiated the Ninth Circuit's application of a "general federal rule . . . that a statute of limitations begins to run when a party knows or has reason to know that she was injured." *Id. (quoting Andrews v. TRW, Inc.*, 22 F.3d 1063, 1066 (9th Cir. 2000)). This Court acknowledged a general application of the discovery rule by circuit courts but explicitly stated that the Court had "not adopted that

position as [the Supreme Court's] own" and proceeded to rule that a discovery rule was not applicable to FRCA §1681p. *TRW Inc.*, 534 U.S. 27. Furthermore, *TRW Inc.* is consistent with this Court's previous holding in *Clark v. Iowa City*, 87 U.S. 583, 589 (1874) that "[a]ll statute of limitations begin to run when the right of action is complete…." *TRW Inc.*, 534 U.S. at 37 (Scalia, A., concurring).

The factual scenario in *TRW Inc.* is similar to the factual scenarios often found in copyright infringement cases, where a plaintiff is injured, but the plaintiff does not come to learn about the injury until a later date. Regardless of the similarity in circumstances, a majority of the lower courts have still been reticent to apply *TRW Inc.* to copyright infringement claims. *See Graham v. Haughey*, 568 F.3d 425, 434 (3d Cir. 2009) (holding that *TRW Inc.* required an inquiry to determine the applicable accrual rule and because the Copyright Act's statute of limitations does not explicitly state an accrual date nor is it implicitly implied based on the text of the statute, the discovery rule is available); *but see Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F.Supp.2d 235 (S.D.N.Y. 2004) (holding that though the text of the statute was not instructive in determining the Copyright Act's accrual rule, the legislative history was supportive of an injury rule for accrual in copyright infringement cases).

B. THIS COURT HAS APPLIED THE DISCOVERY RULE TO A LIMITED SCOPE OF CASES

In *TRW Inc.,* this Court indicated that it has only "recognized a prevailing discovery rule" in cases that involved latent disease and medical malpractice, "where the cry for [such a] rule is loudest." *TRW Inc.*, 534 U.S. at 27 (citing *Rotella v Wood*, 528 U.S. 549, 555 (2000)). The cases in which this Court has applied the discovery rule are distinguishable from copyright cases because in copyright cases the author knows of their authorship and "in most cases, the infringement occurs in public." *Auscape Int'l.*, 409 F.Supp.2d at 247.

In *Urie v. Thompson*, 337 U.S. 163, 166 (1949), the plaintiff suffered an injury from repeated exposure to railroad emissions and developed silicosis. The type of injury in *Urie* is not easily discoverable because symptoms would not have been immediately known, and it would take the use of specialized knowledge and medical equipment to find the injury and its source, thus explaining why the plaintiff's silicosis was not discovered for almost thirty years. *Id.* In contrast, copyright infringement is usually public in nature and does not require specialized experts or equipment to detect. *Auscape Int'l*, 409 F.Supp.2d at 245, 247. Additionally, with advancements in Internet search and database technology, it has become easier for copyright owners to detect infringements and monitor their property. Therefore, a copyright owner should rarely be unable to reasonably discover the injury at the time it occurs.

However, courts favoring a discovery rule have stated that copyright owners do not have a duty to continually police infringing activity to protect their copyrights. *Warren Freedenfeld Assoc. v. McTigue*, 531 F.3d 38, 46 (1st Cir. 2008) (holding that there is no general "standing duty to comb through public records…in order to police their copyright). Regardless of whether there is a duty to police one's copyright, it is easier now for the average copyright owner to check for and be aware of potential copyright infringement. Arguably, copyright infringement cases are more like *TRW Inc.*, where the Court found that the discovery rule was not applicable to that type of case, as opposed to *Urie*, where the Court identified latent diseases as the type of case suitable for a discovery rule. Should the Court decide that the discovery rule is not applicable to the Copyright Act's statute of limitations, it would be consistent with this Court's previous holding in *TRW Inc.*

C. PETRELLA LED TO INCONSISTENT RULINGS REGARDING COPYRIGHT DAMAGES

In *Petrella,* Justice Ginsburg, writing for the Court, devoted several pages to discussing the statute of limitations, emphasizing that "[a] copyright claim thus arises or "accrue[s]" when an infringing act occurs." *Petrella*, 572 U.S. at 670. This Court's extensive discussion of the accrual rule and the three-year limitation on damages is significant because this Court held that any portion of the Supreme Court opinion necessary to the resulting rulings is binding and not just dicta. *Sohm*, 959 F.3d at 52 (quoting

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996)).

Unfortunately, not all lower courts have found *Petrella* to be instructive on whether the Copyright Act's statute of limitations created a three-year limit on retrospective damages, regardless of which accrual rule (injury or discovery) is applied. *Compare Sohm*, 959 F.3d at 28 (The Second Circuit holding that the Supreme Court in *Petrella* "delimited damages to the three years prior to the commencement of a copyright infringement action."), *with Starz*, 39 F.4th at 1244 (The Ninth Circuit rejecting that *Petrella* created a limitation on the recovery of damages).

The Ninth Circuit found the discussion in *Petrella* regarding the three-year statutory limit on retrospective damages to be dicta and not integral to the Court's result. *Starz*, 39 F.4th at 1238. The Eleventh Circuit considers *Petrella's* statements about the availability of relief to only apply to the statute of limitations of claims accruing under the injury rule. *Nealy*, 60 F.4th 1325 at 1331. Conversely, the Second Circuit has found that the discussion regarding retrospective damages was not mere dicta because determining which accrual rule applied and the limit on damages was integral to determining whether laches was available. *Sohm*, 959 F.3d at 54.

Notably, this Court acknowledged the application of the discovery rule by a majority of the lower courts in intellectual property cases and stated that it had not "passed on the question." *Petrella*, 572 U.S. at 671 n.4; *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 337-338

(2017). The Second, Ninth, and Eleventh Circuits have relied on these statements as justification to continue the broad application of the discovery rule as the rule of accrual in copyright infringement cases. *See, e.g.*, *Starz*, 39 F.4th at 1241-1242 (The Ninth Circuit noted that the Supreme Court in *Petrella* made it explicitly clear that it had "not passed on the question" of the discovery rule (quoting *Petrella*, 572 U.S. at 670 n.4)).

Congress enacted a statute of limitations to "(1) create a uniform and certain time period in which copyright claims could be pursued and (2) to prevent forum shopping." *Petrella*, 572 U.S. at 670. The debate over the interpretation of *Petrella* has undermined the purpose of the statute of limitations by deepening a circuit split among the Courts of Appeals regarding the limits on retrospective damages and the applicability of the discovery rule. This issue will not be resolved without this Court settling the matter.

II. CONGRESS INTENDED THE INJURY RULE TO BE THE ACCRUAL RULE UNDER THE COPYRIGHT ACT'S STATUTE OF LIMITATIONS

A. CONGRESS ONLY INTENDED EQUITABLE TOLLING FOR LIMITED SITUATIONS

The Copyright Act does not explicitly state that the discovery rule is applicable to its statute of limitations provisions. 17 U.S.C. § 507(b). Where the text of the statute is silent on the issue, an examination of the statutory structure and legislative history is needed to determine if the discovery rule should apply.

Auscape Int'l, F.Supp.2d at 244 (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984) and *Marvel Characters, Inc. v. Simon*, 319 F.3d 280, 290 (2d Cir. 2002).

The legislative history of Section 507(b) of the 1976 Copyright Act "makes it strikingly clear that Congress intended to adopt" an injury rule "as a discovery rule would have defeated its overriding goal of certainty." *Auscape Int'l*, 409 F.Supp.2d at 247. During discussions regarding the enactment of a statute of limitation to the Copyright Act, Congress deliberated adding equitable tolling language to the statute only for cases involving fraudulent concealment. S. Rep. No. 85-1014, at 2. However, Congress decided against including such language as the "nature of copyright protection and present practices in the publishing industry" made the likelihood of fraudulent concealment scenarios minuscule. *Id.*, at 2-3. *See Auscape Int'l*, 409 F.Supp.2d at 245 (finding the Senate Report's reliance on the hearing discussions significant in drafting the language for the statute of limitations because "copyright infringement by its very nature is not a secretive matter" and "is an act which normally involves the general publication of the work or its public performance") (quoting *Copyrights – Statute of Limitations: Hearing on H.R. 781 Before the House Comm. On the Judiciary, Subcomm. 3*, 84th Cong. 40 (1955) at 11, 51).

Importantly, prior to these Congressional deliberations, this Court had already decided *Urie*, where there was no fraudulent concealment, yet this Court still applied a discovery rule because the nature of latent disease injuries would be hard to discover.

Urie, 337 U.S. at 170. Congress would have undoubtedly been aware of this Court's decision since the discovery rule had already been applied to factual scenarios outside of the fraudulent concealment context, however, the only mention in the legislative history regarding the application of the discovery rule is limited to fraudulent concealment and other equitable doctrines. S. Rep. No. 85-1014, at 2; *Auscape Int'l*, 409 F.Supp.2d at 246-247. Therefore, it is counterintuitive that Congress would have taken the time to discuss statutory exceptions for fraudulent concealment and other equitable doctrines if it intended for the discovery rule to be the rule of accrual because any such exceptions would be "superfluous." *Id.*, at 247

B. CONGRESS HAD ANOTHER OPPORTUNITY TO ADD THE DISCOVERY RULE TO THE COPYRIGHT ACT'S STATUTE OF LIMITATIONS BUT LEFT THE LANGUAGE UNCHANGED

The Copyright Act underwent a general revision with the enactment of the Copyright Act of 1976. Congress spent years discussing possible changes to copyright law. Looking to the discussion for the Copyright Revision Act (1964), when asked why Sections 41(a) and (b) of the Copyright Act of 1957 were not combined together, Barbara Ringer of the Copyright Office stated that members of Congress had already deliberated the issue when Congress added Section 41(b) to the Copyright Act's statute of limitations and that they felt it unnecessary to change its language. H. Comm. on the Judiciary, 88th Cong.,

Copyright Law Revision, Part 4, at 171-173 (Comm. Print 1964).

As though foretelling the future, during the Congressional discussions, Morton David Goldberg observed that the difference between the language in Section 41(a), "arising of a cause of action," and Section 41(b), "accrual of a claim," was needlessly confusing. *Id.*, at 173. Additionally, he posited whether a definition of when a claim accrues should be added, as there could be questions over when a claim accrues, especially regarding cases of multiple infringements. *Id.* However, statutes are to be constructed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.*, 534 U.S, at 31 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). *Black's Law Dictionary* defines the word "accrue" as "to come into existence as an enforceable claim or right; to arise." *Black's Law Dictionary* (11th ed. 2019). Since the word "accrue" can mean to arise the fact that "arise" was used in Section 41(a) and "accrue" was used in Section 41(b) should not be confusing as they arguably mean the same thing. *Id.*; *but see Graham*, 568 F.3d at 434-435 (The Third Circuit finding that the word "arise" and "accrue" have different meanings and that use of the word "accrue" in Section (b) of the Copyright Act's statute of limitations shows that Congress intended the discovery rule to be the rule of accrual).

Notably, even though the risk of confusion was raised, Congress did not change the language, and it ultimately decided to make the statute "substantially identical" to the one enacted in the Copyright Act of 1957 because it represented a "reconciliation of

views." H.R. REP. NO. 94-1476, pt. 2, at 164. Evidently, Congress had multiple opportunities to add language to the Copyright statute of limitations to clarify when the claim accrues or include a discovery rule, yet it declined to do so.

III. THERE IS A CLEAR CIRCUIT SPLIT WHEN CIRCUIT COURTS APPLY THE DISCOVERY RULE REGARDING WHETHER THE COPYRIGHT ACT'S STATUTE OF LIMITATIONS LIMITS RETROSPECTIVE DAMAGES

The Circuits considering the issue have recognized the applicability of the discovery rule, but courts disagree about what retrospective relief is available. *Compare Polar Bear Prods. Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (holding that the Copyright Act's statute of limitations does not bar "recovery of damages more than three years prior to the filing of suit"), *with Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (holding that Bridgeport had knowledge of infringement prior to the three years before filing suit and thus those claims were barred by the Copyright Act's statute of limitations and thus could only recover retrospective damages for the three years prior to filing the claim). To ensure uniformity of the law, this Court has the opportunity to clarify what retrospective relief, if any, is available should it find a discovery rule is applicable.

A. CIRCUIT COURTS THAT PROVIDE RETROSPECTIVE RELIEF FOR OCCURRENCES BEFORE THE THREE-YEAR LOOK-BACK PERIOD

The Ninth Circuit decision in *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994) applied a discovery rule stating, "a cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge." However, *Roley* noted, "Section 507(b) is clear on its face," and retrospective relief was limited to three years prior to the filing of the lawsuit. *Id.*

The Ninth Circuit abandoned this view and deviated from the Second Circuit in *Polar Bear Productions*, where it ruled that *Roley* did not "prohibit the recovery of damages incurred more than three years prior to the filing of suit if the copyright plaintiff was unaware of the infringement." *Polar Bear Productions*, 384 F.3d at 706. After this Court's decision in *Petrella*, the Ninth Circuit revisited the question of whether the statute of limitations limited retrospective relief to three years prior to the suit in *Starz*. *Starz*, 39 F.4th at 1240. The Ninth Circuit declined to recognize that *Petrella* limited retrospective damages to three years when the discovery rule is applied because it would "eviscerate the discovery rule." *Id.*, at 1244. The Eleventh Circuit adopts the reasoning in *Starz*. *Nealy*, 60 F.4th 1325 at 1332.

B. Circuit Courts That Limit Retrospective Relief To Three Years Prior To The Filing Of The Claim.

The Second Circuit has applied a discovery rule to copyright infringement cases but has held that the Copyright Act's statute of limitations limits retrospective relief to three years prior to the filing of the claim. *Stone v. Williams*, 970 F.2d 1043, 1049-1050 (2d Cir. 1992). Following *Petrella*, the Second Circuit revisited the question in *Sohm*, where it upheld the limit on retrospective relief, holding "under the Copyright Act, a plaintiff's recovery is limited to damages incurred during the three years prior to filing suit." *Sohm*, 959 F.3d at 51.

C. The Circuit Split Must Be Resolved To Eliminate Incentivizing Forum Shopping.

One of the purposes of enacting a statute of limitations was to deter forum shopping. S. Rep. No. 85-1014, at 1-2. The existing circuit split does not promote the uniform application of the law and facilitates forum shopping for copyright infringement claims by plaintiffs that could benefit from the application of the broadest possible discovery rule. Currently, for copyright infringement claims that include a discovery issue, a plaintiff's lawyer may be negligent if they did not file in the Ninth or Eleventh circuits, where their client could recover the most damages. Prior cases suggest that the circuit split is unlikely to resolve itself, and therefore, the incentivization of forum shopping will not be

eliminated until this Court provides the necessary guidance.

CONCLUSION

The U.S. Courts of Appeals are increasingly divided regarding the applicability of the discovery rule to copyright infringement claims and whether there is a limit on retrospective damages regardless of which accrual rule is applied. Some of the U.S. Courts of Appeals have yet to address the issue since *Petrella*, and it is unpredictable whether they will follow the Second, Ninth, and Eleventh Circuits or create an entirely new approach. These inconsistencies undermine the Congressional intent to create certainty by enacting the three-year statute of limitations. It is imperative for this Court to resolve this issue.

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