Accrual of Claims Under the U.S. Copyright Act: Will the Supreme Court Discard the Bad Wine of a Not-So-Recent Vintage?

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When does a copyright infringement claim accrue—when the unauthorized use of the work occurs, or when the copyright owner discovers, or reasonably should have discovered, the infringement? As the 2023–24 term begins, it appears that the Supreme Court may be ready, finally, to address that question.

Section 507(b) of the Copyright Act provides that "[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued." Unfortunately, however, the act does not state *when* a "claim accrue[s]." The copyright plaintiffs' bar—most notably on behalf of professional photographers—often leverages the supposed uncertainty of this language to threaten or pursue massive damages by aggregating decades of alleged infringements against their targets. Many times, these targets used the copyrighted works for years, perhaps under a valid license originally, but one they obtained so long ago they no longer have written proof that is necessary to fend off a copyright claim.[1] In other instances, the defendants had relied on long-established industry custom, originally purchasing a license (which they still possess), but didn't necessarily determine whether they had exceeded the scope of their rights in the many years since, as post-publication invoices were routinely requested, transmitted, and paid.[2]

With two isolated (and short-lived) exceptions, discussed below, the overwhelming majority of courts have held that a copyright claim "accrues" not on the date a particular infringement occurs (the so-called injury rule), but when the copyright owner knows or has reason to know of that infringement. This is the so-called discovery rule.

Which Rule Should Apply "by Default"?

Until the fairly recent past, lower federal courts had routinely read the discovery rule into a wide variety of federal statutes that, like the Copyright Act, were silent about when a claim accrues. But in 2001, the Supreme Court unanimously rejected that then prevailing view.[3] In *TRW, Inc. v. Andrews*, the Ninth Circuit had applied this knee-jerk approach by importing the discovery rule into the Fair Credit Reporting Act (FCRA),[4] and it further declared that "the equitable doctrine of discovery is read into *every* federal statute of limitations."[5] The Supreme Court reversed, stating that "beyond doubt, we have never endorsed the . . . view that Congress can convey its refusal to adopt a discovery rule only by explicit command."[6] The Court further observed that its precedent stood solely for the proposition that "equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts."[7]

In a concurring opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, lambasted the Ninth Circuit's view that the discovery rule is, by default, implied into all federal statutes of limitation; in his signature style, Scalia quipped that applying the discovery rule in contexts outside of fraud, latent disease, and malpractice is a "bad wine of recent vintage."[8] Scalia reminded his peers that just four years previously, the Court had determined "that a statute of limitations which says the period runs from 'the date on which the cause of action arose' . . . incorporates *the standard rule* that the limitations period commences when the plaintiff has a complete and present cause of action."[9] He continued: "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief'" and "[t]hat a person entitled to an action [who] has no knowledge of his right to sue, or of the facts out of which his right arises, does not postpone the period of limitation."[10]

Thus, as far as the unanimous Supreme Court was concerned in 2001, the injury rule was to be the default rule for all federal statutes of limitation, unless Congress expressly indicated otherwise.[11] And subsequent Supreme Court cases have reaffirmed that position. For example, in 2010, the Court declared that the discovery rule is "an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action,'"[12] and in 2013, it described the injury rule as "the standard rule."[13]

As recently as 2019, the Supreme Court unanimously rejected yet another argument that the discovery rule should be generally applied to federal limitations periods (this time under the Fair Debt Collection Practices Act). Writing for the Court, Justice Thomas reiterated *TRW*'s fundamental premise:

> This expansive approach to the discovery rule is a "bad wine of recent vintage." . . . It is a fundamental principle of statutory interpretation that "absent provision[s] cannot be supplied by the courts." . . . To do so "'is not a construction of a statute, but, in effect, an enlargement of it by the court.'"
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> A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. Congress has enacted statutes that expressly include the language Rotkiske asks us to read in, setting limitations periods to run from . . . the date of discovery of such violation. . . . In fact, at the time Congress enacted the FDCPA, many statutes included provisions that, in certain circumstances, would begin the running of a limitations period upon the discovery of a violation, injury, or some other event.[14]

Despite *TRW* and its progeny, however, lower federal courts have continued to decant the "bad wine" when dealing with the copyright limitations statute.

The Injury-Based and Discovery-Based Triggers for a Copyright Cause of Action

In the context of copyright infringement claims, the two different accrual rules operate to determine not only *when* the limitations period is triggered, but also whether prior infringements fall within the scope of any available damages recovery. Under the injury rule, a copyright claim accrues on the date of the particular infringement, irrespective of when (or even *if*) the plaintiff learns of it.[15] But attendant to that rule is the separate-accrual premise, which means that a new copyright claim accrues with each discrete infringement (i.e., every new infringing copy, new distribution, or new public display is a separate infringement). Thus, each separate infringement has a definitive three-year period for a timely infringement claim to be pursued on it irrespective of the subjective question of when the copyright owner becomes (or should have become) aware of the infringement itself. Ordinarily, only equitable principles surrounding the defendant's fraudulent concealment of the infringement or a plaintiff's incapacity

(i.e., inability to file suit) ameliorate the sharp edges of an injury rule's application to the limitations' framework.

By contrast, under the discovery rule, the accrual date is "postpone[d] . . . where the plaintiff is unaware of the injury."[16] Thus, it is necessary to determine whether any particular infringement was "immediately discoverable, or whether the accrual date [should] be postponed until it is reasonable to expect the plaintiff to discover the injury."[17] So, if there is concrete evidence that a plaintiff was aware of the infringement on the date it occurred, then the discovery rule is no different as a trigger for the limitations period than the injury rule. But more often, the question is not *whether* the plaintiff was aware of the infringement—indeed, every plaintiff will argue that it wasn't contemporaneously aware—but when it would have been "reasonable" for the plaintiff to have "discovered" that infringement. While this appears to suggest an objective analysis, in practice it has not proven so.

In actual practice, the discovery rule requires a determination whether the plaintiff "should have known of the basis for its claims," that is, "whether [plaintiff] had sufficient information of possible wrongdoing to place it on inquiry notice or to excite storm warnings of culpable activity."[18] This "inquiry notice" question has been aptly summarized by the "familiar aphorism . . . [of] where there is smoke there is fire; but smoke, or something tantamount to it, is necessary to put a person on inquiry notice that a fire has started."[19] But as is readily apparent, the premise of what might constitute "storm warnings" or sufficient "smoke" is a purely subjective, and factually laden, inquiry. In the first step of the analysis, courts place the burden on the defendant to demonstrate that the totality of the circumstances rises to the level of such warnings; only then does the burden shift to the plaintiff to show it "exercised reasonable due diligence and yet was unable to discover" the infringement.[20]

Invariably, at the summary judgment stage, the success of a statute of limitations affirmative defense turns on whether the defendant has shown particular incidents *after* the date of the infringement (the trigger under the injury rule) were, *as a matter of law*, "sufficiently obvious to place any reasonable copyright holder on notice that . . . infringing activity might be afoot."[21] Sometimes these incidents are direct communications between a plaintiff and a defendant, but more often they are merely implications from reporting in trade or legal journals, infringements by other similarly situated parties, or a general practice in the industry.[22] Despite various pronouncements that the "reasonableness" of constructive notice presents an objective question, courts have been unwilling to remove this evidentiary weighing from the jury's hands.[23] Thus, the discovery rule unquestionably imposes significantly greater burdens on defendants in infringement cases than does the straightforward injury rule, which requires proof only of when the unauthorized copying occurred.

As a consequence, the question of *when* a claim accrues, the fundamental trigger for § 507(b)'s three-year period, is not only indefinite in most discovery rule applications, it requires the defendant to put on its case as to *all* infringements of the plaintiff's copyrighted works that may have occurred from the beginning of time, as it seeks to establish the plaintiff had constructive notice. If a jury determines that the date of accrual (the plaintiff's reasonable awareness of infringement) occurred more than three years prior to the filing of the complaint, then all recovery is barred and the rule operates no differently than for the injury-based accrual. Yet more often, the jury credits the plaintiff's arguments that it wasn't aware of the infringements until some period shortly before the complaint was filed, leaving the entirety of the defendant's infringing conduct, whether three years or decades in the past, subject to a damages remedy under the Copyright Act.

The First Split of Authority on the Copyright Act's Statute of Limitations Trigger

Although the Copyright Act of 1909 established a three-year statute of limitations for criminal copyright

infringement,[24] it was not until 1957 that the act was amended to include a three-year limitations period for civil actions as well.[25] The goal of the 1957 amendment was to provide a uniform period within which a civil infringement claim must be filed.[26] Notably, by 1957, copyright infringement largely had been viewed as a "continuing tort," and so long as any single act of infringement occurred within the three-year period, a plaintiff was permitted to maintain a cause of action under the new civil statute of limitations.[27] And from this the first circuit split would develop.

But this statute also left the question of whether recovery was permitted of damages for infringements that occurred outside of the three-year lookback period. In 1983, influential Circuit Judge Richard Posner answered this question in the affirmative, concluding that under the continuing wrong doctrine, which he suggested was a "general principle" not unique to copyright, "the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with."[28] For that reason, the Seventh Circuit concluded the initial unlawful copying at issue was not a "separate and *completed* wrong but simply the first step in a course of wrongful conduct" and the doctrine permitted damages for all unlawful steps along that course.[29] In the alternative—and without much analysis—the court also concluded that because the plaintiff was "unaware of the infringements . . . and . . . could not have been expected to discover them earlier by the exercise of reasonable diligence," the statute of limitations bar for recovery of infringements preceding the three-year period should not apply.[30] Buried in this short alternative discovery rule pronouncement by the court was the premise that in this instance the defendant had, in fact, *fraudulently concealed* its infringement.[31]

Other courts seemingly disagreed with this "continuing wrong" approach, at least at first blush.[32] These cases, which rejected *Taylor*'s continuing wrong doctrine, were the seeds of the discovery rule.[33] The Second Circuit seemingly suggested approval of this view, holding that a copyright-based "cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised," but then it *reaffirmed* its own prior view that "[r]ecovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts."[34]

By early 2014, *every* court of appeals that had addressed the copyright statute of limitations had ruled that an infringement claim "accrues" for § 507(b) purposes only when the putative plaintiff "knows of the infringement or is chargeable with such knowledge," and to the extent such an accrual only occurs within three years of the complaint, a damages recovery would be permitted for all prior infringements (not just those in the three-year period prior to the complaint).[35] Virtually all these courts, either expressly or implicitly, ascribed this view of accrual to the premise that in federal question cases, the discovery rule applies in the absence of a contrary directive from Congress. Clearly, *TRW*'s edict as to this bad wine was being ignored.

But against this sea of uniformity, courts within the Southern District of New York were willing to explore whether the "knee-jerk" default to the discovery rule was truly appropriate. Judge Lewis Kaplan was the first to address whether *infringement* claims under § 507(b) were properly subject to the discovery rule.[36] He noted that, at least in the Second Circuit, the discovery rule had been "simply applied" to *copyright ownership* disputes,[37] more out of the court's habit of "long appl[ying]" the entrenched "general rule" without ever "examining the text or the legislative history of the Copyright Act."[38] Critically, Judge Kaplan saw *TRW* as a watershed moment, noting at the least "*TRW* requires examination of the statutory structure and legislative history in determining whether a discovery or injury rule should apply where, as here, the statute itself is silent on the issue."[39] Finding the structure and text of § 507(b) unhelpful, Judge Kaplan then found the following legislative history surrounding its adoption illuminating:

(1) The goal of a uniform three-year limitations period was to remove the uncertainty concerning

> timeliness that had plagued the copyright bar. Given that the goal was a fixed statute of limitations, it seems unlikely that Congress intended that accrual of an infringement claim—and hence the length of the interval between an infringement and the statutory time bar—would depend on something as indefinite as when the copyright owner learned of the infringement.
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> (2) Congress, as well as participants in the hearings, intended the three-year period to begin at the date of infringement because infringement was by its very nature a public act and the relevant Senate committee regarded a three-year period as sufficient to provide an "adequate opportunity" for the owner to commence his case.
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> (3) Congress was aware that situations would arise in which a copyright owner might not know or have reason to know of an infringement within three years after its occurrence. During questioning on this point, a representative of the Association of the American Motion Pictures responded, "every performance of every moving picture is a separate infringement—if they occurred three years ago. That [sic] would be barred in three years." Thus, Congress was aware that the statute it was enacting would not necessarily allow a remedy for every wrong.
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> (4) Congress's consideration of statutory exceptions for fraudulent concealment and other equitable doctrines ameliorating the statute of limitations, and the question whether to enact such exceptions, suggests an injury-based accrual because a discovery rule would automatically incorporate such considerations.[40]

This legislative history and *TRW*'s edict—that the *default* rule was a "a cause of action is complete and present once a plaintiff may file suit and obtain relief"—compelled Judge Kaplan to conclude that "[i]n the copyright infringement context, the right to sue ripens at the time of the infringement itself."[41] Other courts in the Southern District soon followed this reasoning to hold that the injury rule, not the discovery rule, applies to the three-year limitation period for copyright infringement claims.[42]

But this "circuit-split" would not last. Just over a month before the Supreme Court would release a decision that would at last appear to address the concept of accrual under § 507(b), the Second Circuit finally weighed in, stating that it too "agree[d] with [its] sister Circuits that the text and structure of the Copyright Act . . . evince Congress's intent to employ the *discovery* rule, not the injury rule."[43]

Petrella's Footnote Continues Decanting the Bad Wine

In 2014, the Supreme Court had its first opportunity to address the claim accrual concept under 17 U.S.C. § 507(b). Giacobbe LaMotta, nicknamed the "Raging Bull," was a world middleweight boxing champion between 1949 and 1951. After he retired from boxing, LaMotta and author Frank Petrella wrote a biographical account of LaMotta's life, and that led to a 1980 Martin Scorsese film—*Raging Bull*—which earned Robert De Niro an Academy Award for his portrayal of LaMotta. Nearly 30 years later, a dispute between LaMotta and Petrella's daughter (as her father's heir) over the copyright rights that underpinned the film led to an infringement lawsuit by Petrella against MGM, the film's rightsholder. Petrella sought injunctive relief and monetary damages against MGM for any sales and distribution of the film that had occurred within the three years preceding the complaint. MGM denied liability, and at summary judgment it also invoked the equitable doctrine of laches, arguing that Petrella's decades-long delay in filing her lawsuit was unreasonable and prejudicial, and that, as a result, it was barred as a matter of law. Both the federal district court and the Ninth Circuit agreed, and Petrella sought Supreme Court review.

In a 6–3 decision authored by the late Justice Ruth Bader Ginsburg, the Court held that laches does not ordinarily apply "solely for conduct occurring within the limitations period" because "courts are

not at liberty to jettison Congress' judgment on the timeliness of suit."[44] The Court noted that a "claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.'"[45] It also noted that it is "widely recognized that the separate-accrual rule attends the copyright statute of limitations" and "[u]nder that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation."[46] Thus, in what could have been the final word on accrual, the Court found that "a copyright claim thus arises or *'accrue[s]' when an infringing act occurs*."[47] Yet, in that same breath, the Court included the following footnote:

> Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a "discovery rule," which starts the limitations period when "the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim."[48]

That same paradox was repeated again—in the ensuing text of the opinion—with the Court first finding (apparently unequivocally) that "[u]nder the Act's three-year provision, an infringement is actionable within three years, and only three years, *of its occurrence*, [a]nd the infringer is insulated from liability for earlier infringements of the same work," but then suggesting some amorphous exception to that clear rule by including an unfortunate adverb: "when a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder's suit *ordinarily* will be timely under § 507(b) with respect to more recent acts of infringement (*i.e.*, acts within the three-year window), but untimely with respect to prior acts of the same or similar kind."[49] *Petrella*'s now infamous footnote (and adverb) would spawn nearly another decade of arguments as to the proper interpretation of the Supreme Court's decision and the appropriate trigger for accrual of a claim for infringement under the Copyright Act.

The Second Split of Authority—§ 507(b) Is a Limitation on Remedies?

Despite *TRW* and its progeny, and despite *Petrella*'s tacit indication that "ordinarily" all infringing acts that occurred more than three years before suit were untimely, the courts continue to believe that the bad wine of recent vintage might eventually age well.

Indeed, no circuit court has yet held that both *Petrella* and the unbroken chain of cases starting with *TRW* compel a reconsideration as to whether the discovery rule is appropriate for determining the date of "accrual" for the limitations period under § 507(b). So, unless and until the Supreme Court says so *specifically* with respect to the *copyright* statute of limitations, the bad wine must continue to be decanted.[50]

Ironically, just as the prior circuit split had been snuffed out mere weeks before *Petrella* by the Second Circuit's decision in *Psihoyos*, another circuit split would develop by virtue of the Second Circuit's decision in *Sohm v. Scholastic Inc*.[51] Just as in *Psihoyos*, the Second Circuit was addressing photo copyright infringement claims against a textbook publisher, and many of those infringements had first occurred many years before the complaint was filed. In seeking to harmonize both *Psihoyos* and *Petrella*, Judge Richard Sullivan, writing for a unanimous panel, stated:

> As we noted in *Psihoyos*, we apply "a discovery rule for copyright claims under 17 U.S.C. § 507(b)." Under that rule, "an infringement claim does not 'accrue' until the copyright holder discovers, or with due diligence should have discovered, the infringement."
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> Consequently, *Petrella* and *Psihoyos* counsel that we must apply the discover[y] rule to determine

> when a copyright infringement claim accrues, but a three-year lookback period from the time a suit is filed to determine the extent of the relief available.[52]

This language, at least at first blush,[53] would seem to eviscerate whatever meaning the discovery rule would have by limiting any recovery in an infringement lawsuit to those infringements that occurred within the three years prior to the lawsuit being filed.[54] Thus, it wouldn't matter if a defendant published 1 million copies, and made millions of dollars, four years prior to the suit being filed (even if those infringements were not discovered until the day the suit was filed)—there would be no recovery available for that otherwise "timely" filed claim. And that's precisely the argument that has brought the discovery rule, and *now* the copyright statute of limitations, back to the Supreme Court. Will the bad wine finally be discarded for copyright claims?

Warner Chappell Music and Hearst Newspapers Bring the Copyright's Bad Wine to the Supreme Court

On September 29, 2023, the Supreme Court granted certiorari in the *Warner Chappell Music* case arising out of the Eleventh Circuit's decision that neither *Petrella* nor *TRW* and its progeny restrict the recovery of copyright damages to the three-year lookback period. The dispute in *Warner Chappell* arose out of the plaintiff's alleged ownership of certain compositions and sound recordings, and whether the defendant is properly permitted to issue licenses for such works. At the summary judgment stage, the district court determined that genuine issues of fact remained on two of plaintiff's copyright ownership claims, and held that though the discovery rule applied, *Petrella* limited any damages recovery to infringements by defendant (if any) that occurred within three years of the date on which the lawsuit was filed. This latter determination was certified for interlocutory appeal, and the Eleventh Circuit reversed, holding that *Petrella* "merely describe[s] the operation of the injury rule on the facts of that case . . . and preserved the question whether the discovery rule governs the accrual of copyright claims."[55]

Defendant Warner Chappell's petition for writ of certiorari, in order to present the circuit split that had developed with the *Sohm* decision, limited the question to whether § 507(b) "precludes retrospective relief for acts that occurred more than three years before filing of a lawsuit." Indeed, the underlying case presented significant factual issues as to whether and when plaintiff knew about his claims—the prototypical discovery rule formulation. In granting the petition, the Supreme Court reframed the question, employing the same discovery-rule-based language:

> Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of the lawsuit.[56]

It is not entirely clear whether this question presented is broad enough to allow the Court to truly pour out the bad wine, but Warner Chappell's opening brief, filed at the end of November 2023, places the injury rule and the *TRW* progeny front and center. Briefing will continue through early 2024, and oral argument should be scheduled for later in the 2023 term.

On November 2, 2023, another petition for certiorari was submitted to the Supreme Court by Hearst Newspapers that presents the fundamental question "[w]hether the 'discovery rule' applies to the Copyright Act's statute of limitations for civil claims."[57] That case involves copyright infringement claims by a professional photographer, Antonio Martinelli, premised on uses of his photographs on the internet by Hearst Magazine in 2017. The underlying complaint was not filed until nearly four and a half years later, in October 2021, and Martinelli alleges that he did not discover those uses until—at the earliest—November 17, 2021. The parties in fact stipulated on summary judgment that (i) plaintiff filed

his complaint more than three years after Hearst used the photographs but (ii) less than three years after plaintiff *discovered* those infringements. The parties then proceeded to litigate only the legal question of whether the claims were timely under the Copyright Act.[58] The Fifth Circuit held that neither *Petrella* nor the most recent Supreme Court decision in *Rotkiske* overruled its own precedents as to the application of the discovery rule for copyright infringement claims.[59] Martinelli waived his right to respond in December 2023, and it remains to be seen whether the Supreme Court will grant Hearst's petition, and if so, whether it will consolidate the case with *Warner Chappell Music* or simply hold the *Hearst* case in abeyance.

The Supreme Court Should Find the Injury Rule Applies to Accrual of Copyright Infringement Claims; It's up to Congress to Change That, If It So Intends

At bottom, nothing in the express text of § 507(b) suggests that an infringement claim does not "accrue" until a plaintiff discovers or should have discovered its cause of action. Likewise, nothing in the legislative history of that statute definitively resolves whether Congress *intended* the equitable discovery doctrine to be read into the statute. Indeed, both sides have laid claim to the legislative history.[60]

Rather, the answer would appear to be rather straightforward in light of Supreme Court precedent. First, there can be no dispute that *Petrella* recognized "a copyright claim . . . arises or 'accrue[s]' when an infringing act occurs."[61] This conclusion is anchored in the line of cases starting with *TRW* that all hold a claim accrues when a plaintiff has a complete and present cause of action.[62] This is the injury rule formulation. Second, even if this pronouncement from *Petrella* is dicta or differentiable because it was in the context of a *laches* determination, under *TRW*'s holding, *the absence of any express language in the Copyright Act and the near silent legislative history compel the default rule—the injury rule—to apply*. The Supreme Court has expressly held that the discovery rule cannot be read into federal limitations periods *except* with respect to a narrow range of fraud, latent disease, and malpractice claims. Copyright infringement simply does not fall within those types of unique exceptions to the general presumptive rule—a rule that the Supreme Court has repeatedly reaffirmed.

As of this writing, it remains to be seen whether the Supreme Court will finally pour out the bad wine, or will allow it to continue aging in the lower courts.

Endnotes

1. The loss of access to exculpatory evidence is one reason that *all* claims are subject to temporal limitation. *See, e.g.*, Midland Funding, LLC v. Johnson, 581 U.S. 224, 240–41 (2017) (statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

2. *E.g.*, Palmer/Kane LLC v. Rosen Book Works LLC, 204 F. Supp. 3d 565, 576 (S.D.N.Y. 2016) (discussing arguments about industry custom in context of infringement dispute concerning defendant's pre-license use and overuse of photos in its science textbooks).

3. TRW, Inc. v. Andrews, 534 U.S. 19 (2001).

4. The FCRA, at the time of the *TRW* case, provided that its two-year statute of limitations runs from "the date on which the liability arises." 15 U.S.C. § 1681p (2001). Notably, in December 2003, after the *TRW* decision, Congress amended that statute to state the limitations period is no later than, in relevant part, "2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability" or "5 years after the date on which the violation that is the basis for such liability occurs." *Id.* (as amended by Pub. L. No. 108-159, tit. I, § 156, 117 Stat. 1968 (Dec. 4, 2003)). This amendment, in response to *TRW*, illustrates Congress's ability to expressly incorporate the "discovery" rule when necessary to achieve its legislative priorities for a particular statutory regime.

5. TRW, Inc. v. Andrews, 225 F.3d 1063, 1066 (9th Cir. 2000) (emphasis added).

6. *TRW, Inc.*, 534 U.S. at 27–28.

7. *Id.* at 27. Indeed, the only other contexts in which the Court had "recognized a prevailing discovery rule . . .

were . . . latent disease and medical malpractice, 'where the cry for such a rule is loudest.'" *Id.* (citations omitted).

8. *Id.* at 37 (Scalia, J., concurring).

9. *Id.* at 36 (quoting Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997)).

10. *Id.* at 37 (citations omitted).

11. *See, e.g.*, Wallace v. Kato, 549 U.S. 384, 388 (2007); Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 418 (2005).

12. Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 644 (2010) (quoting *Bay Area Laundry*, 522 U.S. at 201).

13. SEC v. Gabelli, 568 U.S. 442, 448 (2013) (holding that the "standard rule" is that a claim accrues "when the plaintiff has a complete and present cause of action") (citation omitted).

14. *See* Rotkiske v. Klemm, 140 S. Ct. 355, 360–61 (2019).

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

16. William A. Graham Co. v. Haughey, 568 F.3d 425, 438 (3d Cir. 2009).

17. *Id.* (quotations omitted).

18. *Id.* (internal quotations and brackets omitted).

19. Warren Freedenfeld Assocs., Inc. v. McTigue, 531 F.3d 38, 45 (1st Cir. 2008).

20. *Haughey*, 568 F.3d at 438.

21. Grant Heilman Photography, Inc. v. McGraw-Hill Cos., 2012 U.S. Dist. LEXIS 168550, at *14–16 (E.D. Pa. Nov. 27, 2012).

22. Courts have held there is "no general, free-standing duty [on plaintiffs] to comb through public records" or search the internet "in order to police their copyrights." Design Basics, LLC v. Chelsea Lumber Co., 977 F. Supp. 2d 714, 725 (E.D. Mich. 2013) (quotation omitted).

23. *Id.* ("While a jury may agree with McGraw's contention that the two incidents were sufficient to put GHPI on notice, GHPI has introduced evidence to enable a jury to reasonably reach the opposite conclusion as well.").

24. The 1909 act provided that "no criminal proceeding shall be maintained under the provisions of this act unless the same is commenced within three years after the cause of action arose." *See* Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, § 39, 35 Stat. 1075 (enacted Mar. 4, 1909).

25. Act of Sept. 7, 1957, Pub. L. No. 85-313, § 1, 71 Stat. 633 (1957). Prior to the 1957 amendment, federal courts applied the most analogous statute of limitations from the state where the suit was filed. *E.g.*, McCaleb v. Fox Film Corp., 299 F. 48 (5th Cir. 1924) (applying state statute of limitations for civil copyright infringement in dispute over *The Scarlet Letter*).

26. Civil Copyright Actions—Statute of Limitations, S. Rep. No. 85-1014 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1961, 1962 (noting Senate committee agreed that it was "highly desirable to provide a uniform period throughout the United States").

27. *E.g.*, Baxter v. Curtis Indus., Inc., 201 F. Supp. 100, 101 (N.D. Ohio 1962) (period of limitations runs from the last infringing act).

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

29. *Id.* at 1119 (emphasis added).

30. *Id.*

31. *Id.*

32. *See* Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108, 1111 (2d Cir. 1977) (recovery only permitted for infringing sales within limitations period); Hoste v. Radio Corp. of Am., 654 F.2d 11 (6th Cir. 1981) (act bars recovery of any claims of damages that accrued prior to three years before the complaint); Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994); Hotaling v. Church of Latter-Day Saints, 118 F.3d 199, 202 (4th Cir. 1997) (same); *In re* Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1469, 1478 (D. Kan. 1997).

33. *E.g.*, *Roley*, 19 F.3d at 481 ("A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge."); *Hotaling*, 118 F.3d at 202 (same); *In re Indep. Serv. Orgs. Antitrust Litig.*, 964 F. Supp. at 1479 (approving of premise that limitations tolled until plaintiff "actually discovered or reasonably should have discovered" infringement).

34. Stone v. Williams, 970 F.2d 1042, 1048, 1049–52 (2d Cir. 1992); *see also* Hoey v. Dexel Sys. Corp., 716 F. Supp. 222, 223 (E.D. Va. 1989) ("§ 507(b) . . . does not provide for a waiver of infringing acts within the limitation period if earlier infringements were discovered and not sued upon, nor does it provide for any reach back if an act of infringement occurs within the statutory period. In a case of continuing copyright infringements an action may be brought for all acts which accrued within the three years preceding the filing of the suit.").

35. *E.g.*, William A. Graham Co. v. Haughey, 568 F.3d 425, 433–41 (3d Cir. 2009); *see* Graper v. Mid-Continent Cas. Co., 756 F.3d 388, 393 (5th Cir. 2014); Warren Freedenfeld Assocs. v. McTigue, 531 F.3d 38, 44–46 (1st Cir. 2008); Comcast v. Multi-Vision Elecs., Inc., 491 F.3d 938, 944 (8th Cir. 2007); Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC, 477 F.3d 383, 390 (6th Cir. 2007); Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 705–07 (9th Cir. 2004); Gaiman v. McFarlane, 360 F.3d 644, 653 (7th Cir. 2004); Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 796 (4th Cir. 2001); Daboub v. Gibbons, 42 F.3d 285, 291 (5th Cir. 1995); *see also* Shell v. Henderson, 2013 U.S. Dist. LEXIS 76690, at *31 (D. Colo. May 31, 2013); Habersham Plantation Corp. v. Art & Frame Direct, Inc., 2011 U.S. Dist. LEXIS 100726, at *29–30 (S.D. Fla. Sept. 8, 2011).

36. *See* Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235, 243 (S.D.N.Y. 2004).

37. Nothing in the statutory text of § 507(b) or in its legislative history suggests that different rules for accrual should apply to ownership disputes as opposed to infringement under the Copyright Act.

38. *Auscape*, 409 F. Supp. 2d at 243.

39. *Id.* at 244.

40. *Id.* at 244–47.

41. *Id.* at 247.

42. TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 608 (S.D.N.Y. 2013); Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co., 2013 WL 4464002, at *6 (S.D.N.Y. Aug. 21, 2013); Urbont v. Sony Music Ent. Corp., 863 F. Supp. 2d 279, 282 (S.D.N.Y. 2012); Bill Diodato Photography LLC v. Avon Prods., Inc., 2012 WL 3240428, at *3 (S.D.N.Y. Aug. 7, 2012); Harris v. Simon & Schuster, Inc., 646 F. Supp. 2d 622, 630 (S.D.N.Y. 2009); Broadvision Inc. v. Gen. Elec. Co., 2009 WL 1392059, at *6 (S.D.N.Y. May 5, 2009); *but see* Psihoyos v. John Wiley & Sons, Inc., 2011 WL 4916299, at *5 (S.D.N.Y. Oct. 14, 2011).

43. Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 124 (2d Cir. 2014) (emphasis added).

44. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667 (2014) (citing § 507(b)).

45. *Id.* at 670 (quoting Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997)).

46. *Id.* at 671.

47. *Id.* at 670–71 (emphasis added).

48. *Id.* at 671 n.4.

49. *Id.* at 671–72 (emphases added).

50. Martinelli v. Hearst Newspapers, LLC, 65 F.4th 231, 239 (5th Cir. 2023) ("*Petrella*'s general statements about statutes of limitation and the separate-accrual rule leave room for caselaw holding that the discovery rule applies to § 507(b)."); Nealy v. Warner Chappell Music, Inc., 60 F.4th 1325, 1332–33 (11th Cir. 2023) ("We do not read . . . *Petrella* to create a three-year lookback period or a damages cap. . . . It would be inconsistent with *Petrella*'s preservation of the discovery rule to read *Petrella* to bar damages for claims that are timely under the discovery rule."); Starz Ent., LLC v. MGM Domestic TV Distribution, LLC, 39 F.4th 1236, 1246 (9th Cir. 2022) ("[T]he best read of *Petrella* is that it did not change any law in the Ninth Circuit pertaining to the discovery rule and the three-year damages bar. . . . Neither the text of the Copyright Act nor *Petrella* imposes a three-year damages bar in a discovery rule case.").

51. 959 F.3d 39 (2d Cir. 2020).

52. *Id.* at 50–52.

53. Another possible reading—and one at least implicitly suggested by the Second Circuit—is that the discovery rule is used to determine whether all claims of a "same or similar kind," even those occurring within the three-year lookback, are barred as a matter of law. That is, if a defendant is able to demonstrate that plaintiff knew or should have known of its infringement claims more than three years prior to the complaint, then *all* of its claims would be

barred under the application of § 507(b). *See id.* at 51 (affirming notion that Scholastic failed to meet its burden on summary judgment to show "Sohm should have discovered the alleged copyright infringements at issue in this case"). Such a reading also may be consistent with the "ordinarily" language in *Petrella*. *See supra*. "Ordinarily," a plaintiff would be permitted to recover for infringing acts within the three-year limitations period, but if a defendant is able to demonstrate that plaintiff had been or should have been aware of its claims (of a same or similar kind) for years longer, then any and all relief may be barred. Indeed, such a reading would also be consistent with the *Petrella* notion that the equitable *laches* doctrine is inapplicable to claims that fall within a statutorily expressed limitations period. *See supra*.

54. *See Warner Chappell Music*, 60 F.4th at 1334 ("There is no escaping the conclusion that [*Sohm*'s approach] would gut the discovery rule by eliminating any meaningful relief for timely claims, even though . . . [*Petrella*] expressly left open whether a discovery rule applies to copyright claims.").

55. *Id.* at 1332–33.

56. Warner Chappell Music, Inc. v. Nealy, 216 L. Ed. 2d 1313 (U.S. Sept. 29, 2023). Several amici filed briefs that did present the more fundamental question of whether the discovery rule properly applies to the accrual of copyright claims under § 507(b). Most argued that neither the text nor the legislative history of the civil limitations period under the Copyright Act support such an accrual rule. *See* Brief of the Chamber of Commerce of the U.S.A. as Amicus Curiae in Support of Petitioners, *Warner Chappell Music*, 2023 U.S. S. Ct. Briefs LEXIS 3769 (Dec. 4, 2023) (No. 22-1078); Brief of Southwestern Law Student Krystina L. Cavazos, & Professors Orly Ravid, Robert C. Lind & Michael Epstein, in Association with the Amicus Project at Southwestern Law School, as Amici Curiae in Support of Petitioners, *Warner Chappell Music*, 2023 U.S. S. Ct. Briefs LEXIS 3777 (Dec. 1, 2023) (No. 22-1078).

57. Petition for Writ of Certiorari, Hearst Newspapers v. Martinelli, U.S. No. 23-474 (Nov. 2, 2023).

58. Martinelli v. Hearst Newspapers, LLC, 65 F.4th 231, 234 (5th Cir. 2023).

59. *Id.* at 245.

60. *Compare* Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235, 244–47 (S.D.N.Y. 2004), *supra*, *with* William A. Graham Co. v. Haughey, 568 F.3d 425, 437 (3d Cir. 2009) ("Congress provided no 'directive' mandating the use of the injury rule in th[e] legislative history. . . . [U]se of the discovery rule comports with the text, structure, legislative history and underlying policies of the Copyright Act.").

61. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 670–71 (2014).

62. *See supra* notes 44–49 and accompanying text.