

IN THE  
**Supreme Court of the United States**

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RADESIGN, INC., ET AL.,

*Petitioners,*

v.

MICHAEL GRECCO PRODUCTIONS, INC.,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Second Circuit**

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**BRIEF OF INDIANA PACERS, DENVER  
NUGGETS, MINNESOTA TIMBERWOLVES,  
NEW ORLEANS PELICANS, ORLANDO MAGIC,  
PORTLAND TRAIL BLAZERS, SACRAMENTO  
KINGS, AND SAN ANTONIO SPURS  
AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICI CURIAE

Amici Curiae are eight professional basketball teams, each a member of the National Basketball Association (NBA). Today's American professional sports business is a multimedia entertainment enterprise that offers live, recorded, and produced content across all types of media, including television, streaming, and social media platforms. Amici regularly broadcast, stream, post, and produce content that features live game performances and/or commentary from players and coaches. That content includes social media posts that sometimes capture the incidental and occasionally unintended use of music. Amici are presently defendants in copyright infringement cases pending in the Southern District of New York in which the discovery rule is being asserted by well-recognized music publishers to justify delays in bringing suit against social media posts that are, in some cases, more than a decade old.

Amici submit this brief in support of Petitioners to urge the Court to resolve a critical issue relating to the liability of parties for stale claims of copyright infringement on the Internet.<sup>1</sup>

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<sup>1</sup> In accordance with Rule 37.2, counsel of record for all parties received notice of the intention to file this brief at least ten days prior to the brief's due date. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amici curiae or their counsel made a monetary contribution to the brief's preparation or submission.

## INTRODUCTION & SUMMARY OF ARGUMENT

This Court has never adopted a “discovery rule” for copyright infringement actions, and the text of the Copyright Act’s limitations provision does not mention any such a rule: It requires that an infringement claim be brought “within three years after the claim accrued”—period. 17 U.S.C. § 507(b).

Nevertheless, the Circuit Courts have settled on the general notion that copyright infringement claims can be brought more than three years after they accrued, so long as they are brought within three years after they were (or should have been) discovered.

Amici file this brief to explain that this discovery rule, motivated by courts’ desire to provide relief for plaintiffs who are late in “discovering” an infringing use, goes far beyond relieving innocent plaintiffs: The discovery rule has become a powerful weapon for copyright trolls, with two recent decisions of this Court unintentionally boosting its potential for abuse.

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014), the Court ruled that the equitable defense of laches does not apply to copyright infringement claims. Laches “cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window.” *Id.* Thus, one traditional defense to stale claims is no longer

available. Regardless of the unavailability of evidence or witnesses, or any change in circumstances in reliance upon settled expectations, a defendant can no longer raise laches as a defense to infringement.

In *Petrella*, the Court consoled the public that this would not create manifest injustice because “the copyright statute of limitations, § 507(b), itself takes account of delay.” *Id.* at 676. In particular, an infringement claim must be brought “within three years after the claim accrued.” *Id.* at 670 (quoting 17 U.S.C. § 507(b)). Observing without comment the lower courts’ contrary discovery rule, *id.* at 670 n.4, the Court explained that because an infringement claim “accrues when an infringing act *occurs*,” an “infringement is actionable within three years, and only three years, of its *occurrence*,” *id.* at 671 (emphases added; alterations, quotation marks, and citations omitted). The Court assured litigants that this implied that plaintiffs can obtain “retrospective relief running only *three years back* from the date the complaint was filed.” *Id.* at 672 (emphasis added).

This last assurance, however, proved illusory. Last year, in *Warner Chappell Music, Inc. v. Nealy*, the Court held that “no such limit on damages exists,” for the Copyright Act authorizes “damages for any timely claim.” 601 U. S. 366, 368 (2024).

But what is a “timely claim”? In *Nealy*, the Court pointedly declined to decide whether timeliness turns on “injury” (*i.e.*, when infringement occurred) or on



“discovery.” 601 U.S. at 371. Justice Gorsuch, in dissent, addressed this question and concluded that “the Act almost certainly does not tolerate a discovery rule.” 601 U.S. at 374 (Gorsuch, J., dissenting).

As Justice Gorsuch recognized, this question— injury rule or discovery rule—“does matter” and calls out for the Court’s resolution. 601 U.S. at 374 (Gorsuch, J., dissenting). Together, *Petrella* and *Nealy* have ripped a hole in the statute of limitations into which copyright trolls have marched. With no effective limit on their ability to pursue decades of damages for stale claims, trolls have searched the Internet for long-discarded Instagram posts and sued. The discovery rule is encouraging sophisticated firms to dig up old content specifically to bring claims *that the Act’s text unambiguously bars*. This is wasteful, inequitable, and contrary to Congress’s intent. The Court should grant the petition and put a stop to it.

## ARGUMENT

### I. The Discovery Rule Invites Uncertainty and Abuse

#### A. With laches unavailable after *Petrella*, the discovery rule effectively repeals the Act’s limitations period for plaintiffs who profess ignorance of infringement

Under the dominant formulation of the discovery rule, a claim accrues “when the copyright holder knows or reasonably should know that an

infringement occurred.” *Starz Entm’t, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236, (9th Cir. 2022); accord *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (holding that “an infringement claim does not ‘accrue’ until the copyright holder discovers, or with due diligence should have discovered, the infringement”).

Because the discovery rule turns on the plaintiff’s knowledge, it treats plaintiffs very differently based on the extent to which they actively try to police infringement on the Internet. The diligent copyright plaintiff may recover three years of past damages from an infringing Internet post. But a copyright plaintiff who has taken no action and professes no knowledge of infringement is subject to no such limitation. Indeed, the less knowledgeable the better: Because *Petrella* has eliminated the laches defense, and there is no “look back” limit under *Nealy*, an uninformed plaintiff may reach back and claim 10 or more years of damages.

Although the “should have known” standard under the discovery rule might, in theory, offer protection against ancient claims, in practice this rarely, if ever, happens. First, courts routinely hold that the reasonableness of a plaintiff’s purported ignorance is an issue of fact that essentially precludes judgment on the pleadings or summary judgment. See *Polar Bear Prod., Inc. v. Timex Corp.*, 384 F.3d 700, 707 (9th Cir. 2004) (“Notwithstanding Timex’s assertion that Polar Bear should have discovered the

infringement earlier, the date of discovery is an issue of fact . . . .”). Second, as the *RADesign* case below illustrates, even the most sophisticated plaintiffs with professional search and litigation programs can hide behind the simple profession of “late discovery.” See *Michael Grecco Prods. v. RADesign, Inc.*, 112 F.4th 144, 152 (2d Cir. 2024). Accordingly, there is effectively no limit on the accumulation of damages for a copyright claim.

**B. The discovery rule’s nullification of the Act’s statute of limitations creates an environment ripe for copyright trolling**

The unbounded scope of damages for copyright infringement under the discovery rule offers a reward for plaintiffs who lie in wait for years, as potential damages accumulate, notwithstanding the fact that defendants might have ameliorated or removed the infringement on a moment’s notice had they been informed of the claim. Where there is a financial reward for behavior, experience shows that it will increase. Copyright litigation is no exception.

Copyright troll litigation can take several forms. In the first wave of copyright troll cases, the primary targets were blatant (if small-time) copyright infringers: Specially created litigation plaintiffs would sue users of Internet file-sharing services who infringed copyrighted music and video. These suits, which numbered in the thousands per year at their peak, sought quick settlements of several thousand

dollars based on often sketchy evidence that a specific individual had illegally copied a single work—typically a work that could be obtained at retail for under \$20. *See, e.g., Malibu Media, LLC v. Mullins*, No. 18-cv-06447, 2021 WL 122715 (N.D. Ill. Jan. 13, 2021) (granting defendant’s motion for attorneys’ fees against the single most prolific copyright troll); *see generally* Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 575–578 (2018) (in the 2015–2016 time period alone, Malibu Media filed 2,646 copyright infringement complaints).

The last several years have witnessed a second wave of copyright troll litigation that seeks to exploit the ambiguities inherent in fair use law to take aim at innocent content producers. These suits assert that any incidental “use” of a copyrighted work that is captured even momentarily in Internet posts is an infringement, and demand similarly inflated settlement payments. For example, Righthaven LLC notoriously sued over short snippets of news articles and even simple “links” to those articles. *See, e.g., Righthaven LLC v. Democratic Underground LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011); *see generally* Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 65–69 (2014).

A more recent version of the Righthaven scheme targets social media posts that incorporate snippets of music or images in the background. Since 2012, the meteoric rise of Instagram and TikTok have made

short posts of user photos and video ubiquitous. There are more than 80 million new Instagram posts and more than 20 million new TikTok videos posted every single day. The collective number of posts available on these platforms now easily exceeds 50 billion. Amidst this endless cornucopia of puppies and teenage fashion tips, there are tens of millions of short clips that include music or images that come from another copyrighted work. A clip might briefly show a television set or household speaker in the background; it might glance at a billboard or public image; or it might include a touchdown theme song or arena anthem celebrating a team's victory (which a determined listener can hear in the background of a 15-second clip of a player making the winning score).

These myriad incidental uses create fertile ground for copyright trolling. Today's technology allows sophisticated copyright trolls to sift through oceans of social media content and identify users with numerous posts that could form the basis of a threatening and costly infringement claim.

Making matters worse, the Copyright Act provides a second "incentive" for copyright plaintiffs to accumulate dozens or hundreds of small claims—the "statutory damages" available under 17 U.S.C. § 504(c). Because statutory damages can be assessed up to \$30,000 per work (\$150,000 per work in cases of "willful" infringement), the potential litigation value of a brief, incidental infringement can be hundreds of times larger than the commercial value of the use. *See*

Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1114 (2015) (“[S]tatutory damages can make pursuing otherwise inconsequential infringements extremely profitable, more profitable than licensing those uses in advance could ever have been.”).

These incentives created by the discovery rule have led to a surge of litigation, as confirmed by the Federal Judicial Caseload Statistics. In 2001, copyright infringement filings were the least common of the three intellectual property case types (patent, trademark, and copyright); last year’s report shows that patent and trademark infringement filings have stayed constant over the years, but copyright cases have more than tripled, and now *exceed all other federal intellectual property cases combined*.<sup>2</sup>

### **C. Professional litigation trolls have emerged to take an end-run around the Act’s statute of limitations**

The expansive discovery rule for copyright infringement actions lays out a simple playbook for trolls targeting social media posts: A contingency fee lawyer and a technology company scour the internet using automated bots that compile information about the use of music or images in social media posts; they accumulate this information over time, allowing them

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<sup>2</sup> See Federal Judicial Caseload Statistical Reports, 2001 & 2024, <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics>.

to target users who post frequently, thereby building up the potential claim for statutory damages. When the total reaches a figure large enough to frighten defendants into paying, they approach the copyright owner and offer a deal: We'll bring the claim for a fee.

Under the common law, this would be a classic example of illegal champerty. *See, e.g., Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 94 N.Y.2d 726, 729 (N.Y. 2000) (“Champerty is a venerable doctrine developed hundreds of years ago to prevent or curtail the commercialization of or trading in litigation.”); *Frank v. Tewinkle*, 45 A.3d 434, 438 (Pa. Super. Ct. 2012) (“[A] champertous agreement is one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense in consideration of receiving a share of what is recovered.”); *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121, 125 (Ohio 2003) (“Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation.”). Champerty laws, however, have been watered down in many states, and are non-existent in others. Today, locating, funding, and litigating these otherwise minor claims has become big business.

The current incarnation of the discovery rule has also allowed professional copyright trolls to develop a straightforward method to manipulate when “discovery” occurs. A simple illustration is the copyright infringement suit filed by Freeplay Music,

LLC against CNN in November 2022—predictably in the Central District of California, where the discovery rule is applied in the broadest fashion, and not in New York, where Freeplay Music is based, or Atlanta, where CNN is based. *See Freeplay Music, LLC v. Cable News Network, Inc.*, C.D. Cal. No. 22-cv-08680-FMO, Dkt. 1. Freeplay Music’s complaint states that Freeplay Music was founded by Scott Schreer, who is its CEO, and that the company has accumulated a library of music rights. *Id.* at ¶¶ 31–32. Freeplay Music’s complaint alleges that it was only through the fortuitous use of the TuneSat Internet search service that Freeplay was able to discover the infringing uses by CNN, which were only communicated by TuneSat to Freeplay earlier in 2022.<sup>3</sup> *Id.* at ¶¶ 41, 27–28. Given this allegedly recent “discovery,” Freeplay contended that it is free to seek damages for every prior infringing use by CNN, regardless of how far back in time each use might have been.

What Freeplay Music’s complaint did not mention—Mr. Schreer, the CEO of the plaintiff, *is also the founder and CEO of TuneSat*, the technology company that searched the Internet looking for uses of the music. Nor did the complaint mention that Mr. Schreer’s attorney was simultaneously the general

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<sup>3</sup> TuneSat, LLC uses proprietary Internet software to crawl the Web and detect uses of music in social media posts, podcasts and other Internet sites, creating an extensive database of its search results. By creating this database, TuneSat ensures that it has the ability to search for copyright infringement even in social media posts that have long since been deleted from the Internet.



counsel of TuneSat and Freeplay. By segregating the investigative function of TuneSat from the rights-holding function of Freeplay Music, Mr. Schreer and his counsel have exploited a critical weakness in the discovery rule, seizing a bonus prize of damages unbounded by the passage of time. Even though TuneSat has accumulated a vast database of Internet posts using music going back more than a decade (for the sole purpose of bringing infringement cases), the “plaintiff” entity in these cases dutifully swears that it didn’t “discover” the infringement until recently because TuneSat didn’t deliver that information until it was convenient (and profitable) to do so.<sup>4</sup>

Thus, Freeplay Music dutifully alleged that over the course of years, CNN and its affiliates infringed 76 works hundreds of times, and sought \$150,000 in statutory damages per work—total of over \$11 million. The actual license value of the Freeplay Music works is a tiny fraction of that sum, but no one was surprised when CNN settled the case prior to significant discovery.<sup>5</sup>

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<sup>4</sup> As the CNN case illustrates, TuneSat is prepared to use this abusive strategy even when both entities share the same CEO and general counsel.

<sup>5</sup> Freeplay Music has been accused of a host of other misleading and unfair actions in connection with its copyright trolling scheme. *See, e.g., Freeplay Music, LLC v. Ford Motor Co.*, E.D. Mich. No. 20-CV-10948-SJM, Dkt. 15 (Answer and Counterclaim of Ford Motor Co. alleging false advertising by Freeplay); *Collective Digital Studio, LLC v. Freeplay Music, LLC*, C.D. Cal.

TuneSat and Mr. Schreer have not stopped at lawsuits over Mr. Schreer's own music. They have joined forces with large litigation funding operations to target Instagram and TikTok posts that have tiny snippets of music. To do so, they've created a captive law firm (led by the TuneSat general counsel) that sends demand letters to hundreds of parties.

Amici are all recipients of these demands. In many cases, the demands seek payment for brief social media posts of live game footage on the theory that the music playing in the arena can be heard for a few seconds.<sup>6</sup>

In one particularly extreme case, Amici Indiana Pacers were accused of infringement because the team posted a short video clip of a U.S. combat veteran who reunited with his family on the court during a break in a Pacers' game. Plaintiffs alleged that there was music playing in the arena in the background of the clip. For this one brief and completely incidental use, the plaintiffs demanded \$35,000 from the Pacers. *See Artists Publishing Grp.*,

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No. 15-cv-00936-JFW, Dkt. 1 (Complaint for Unfair Competition); *Mytee Products v. TuneSat, LLC*, S.D. Cal. No. 15-cv-00236-AJB, Dkt. 1 (Complaint for Unfair Competition).

<sup>6</sup> NBA teams have 'public performance licenses' for the music that is played in the arena to the live crowd during games. Plaintiffs assert, however, that very short clips posted to TikTok or Instagram, in which that music could (in theory) be discerned, is a 'separate use' outside of the public performance license.

*LLC et al. v. Pacers Basketball, LLC dba Indiana Pacers*, S.D.N.Y No. 24-cv-5456 (filed July 18, 2024).

Tellingly, the video in question was uploaded to the Internet *in March 2014*. Plaintiffs did not file suit until July 2024, more than ten years later. Indeed, they did not file suit until many years after the team had taken the video down. But in a world where the discovery rule has nullified the Copyright Act's limitations period, none of this posed a problem for plaintiffs. All they had to do was claim that they did not "discover" the use on the Internet until recent years. And this gambit not only gave them the right to sue, but, under *Nealy*, allowed them to allege damages going back ten full years.

## **II. The Permanence of the Internet Weighs Strongly in Favor of Certainty in the Retirement of Stale Claims**

As a result of vastly multiplied storage and server capacity, virtually every feature of the Internet is preserved somewhere. Ancient Twitter posts are fertile ground for research; Facebook and Instagram posts go back more than a dozen years. The Internet Archive (a California-based non-profit) hosts more than 600 billion web pages, dating back more than 20 years, through its "Wayback Machine" service.<sup>7</sup>

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<sup>7</sup> See, e.g., *Pond Guy, Inc. v. Aquascape Designs, Inc.*, No. 13-13229, 2014 WL 2863871 (E.D. Mich. Jun. 24, 2014) ("The Court takes judicial notice of the parties' historical internet presence as represented by the Internet Archive.").

Precisely because the Internet is “forever,” copyright claims shouldn’t be. As the Court recognized in *Petrella*, there are important reasons of policy and practicality that favor the retirement of stale claims.

The 1909 Copyright Act did not originally contain a statute of limitation, and the federal courts therefore adopted state law statutes of limitation, which varied throughout the country. *See Petrella*, 572 U.S. at 669–70. Congress fixed that omission in 1957, adding the current limitation period set forth in § 507(b). *Id.* at 670. As *Petrella* explained, § 507(b)’s limitations period “serves two purposes: (1) to render uniform and certain the time within which copyright claims could be pursued; and (2) to prevent the forum shopping invited by disparate state limitations periods, which ranged from one to eight years.” *Id.* (citing Senate Report 2 and H. R. Rep. No. 2419, 84th Cong., 2d Sess., 2 (1956)).

*Petrella* emphasized that the Act’s limitations period is an important counter-balance to copyrights’ extraordinary duration. Notwithstanding the Constitution’s use of the term “limited time,” authors now hold exclusive rights for their entire lives, and the copyright will continue for 70 years thereafter—*i.e.*, essentially for the entire life of their children. Congress set the well-defined three-year statute of limitation against that backdrop: The “copyright term ... endures for decades, and may pass from one generation to another,” whereas “§ 507(b)’s limitations period ... allows plaintiffs during that

lengthy term to gain retrospective relief running only three years back from the date the complaint was filed.” *Petrella*, 572 U.S. at 672.

The discovery rule destroys that balance and frustrates Congress’s intent. So long as a plaintiff will swear that its “discovery” was recent, there is no limit to how long it can wait to bring suit. And *Nealy* says that, assuming the discovery rule exists, there is no time limit on bringing claims *and* “no separate time-based limit on monetary recovery.” 601 U.S. at 374.

In short, the discovery rule allows claims to be brought decades after an infringing use—so long as the plaintiff avers that it has only recently discovered the act. Indeed, whether an infringement claim is timely might turn on whether the plaintiff was paying attention (or gives the right testimony).

The inherent inequity in the varied and unpredictable outcomes under the discovery rule is magnified by the permanent and fundamentally passive nature of the Internet. Photos and video clips posted to the Internet remain available for decades, without any further action by the original poster. Blog posts and Twitter posts from 2008 are easily found; web pages from 1998 exist on the Wayback Machine; Instagram posts made by teenagers in 2012 might be available for decades to come. This is especially true of live events, where teams and fans might engage on social media about a game for 48 hours, and then move on to the next game. Years later, much of this

might be long forgotten by the original posters—but under the discovery rule, it remains grist for an exploitative copyright suit.

Amici, like all participants in professional sports, are especially vulnerable because nothing lasts on the Internet like a famous sporting event. Whether it is Michael Jordan’s final shot in the 1998 NBA Finals,<sup>8</sup> or David Ortiz’ walk-off homerun to win the 2004 ALCS,<sup>9</sup> or just an average week’s touchdown celebration or NHL shoot-out victory, all of these moments are preserved forever on the Internet. There are countless athlete posts, in-stadium fan videos, and millions of casual fans who have replicated game moments on social media.<sup>10</sup> Any one of these posts might result in a copyright infringement lawsuit “discovered” a decade or more after the post is shared.

The YouTube clip of David Ortiz’s walk-off homerun from the 2004 American League Championship Series perfectly illustrates the danger of the unchecked discovery rule. It is a short highlight of a single at-bat in a famous and historical game. All of the viewer’s attention is on Mr. Ortiz and the significance of the moment. And yet, as Mr. Ortiz

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<sup>8</sup> <https://www.youtube.com/watch?v=MlzL6bT1C2U>

<sup>9</sup> <https://www.youtube.com/watch?v=xYxSZJ9GZ-w>

<sup>10</sup> As previously noted, professional sports teams pay for “public performance” licenses to use music in their arenas and stadiums to enhance the fan experience. This music might be inadvertently captured in a social media clip of the game.

rounds the bases, a careful listener can hear the Fenway Park PA system in the background playing “*Dirty Water*,” a celebratory song that is played (under license) by the Boston Red Sox after victories. As the law currently stands, those few seconds of background music are a potential infringement claim with 20 years of accumulated damages.

### CONCLUSION

The Court should grant the petition for writ of certiorari, and restore certainty and predictability to copyright infringement claims by rejecting the discovery rule in favor of the injury rule.

Respectfully submitted,

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