No. 24-768

IN THE

Supreme Court of the United States

RADESIGN, INC., *et al.*,

Petitioners,

v.

MICHAEL GRECCO PRODUCTIONS., INC.,

Respondent.

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

BRIEF OF *AMICUS CURIAE*
TYLER T. OCHOA
IN SUPPORT OF PETITIONERS
AND THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* **1**

SUMMARY OF ARGUMENT **2**

ARGUMENT **3**

I. THE SECOND CIRCUIT'S OPINION IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISION IN *PETRELLA*. 6

II. THERE IS ALREADY A SPLIT IN THE LOWER COURTS CONCERNING THE LEGAL BASIS FOR THE DISCOVERY RULE. 9

III. THE DISCOVERY RULE WAS ADOPTED MOSTLY WITHOUT ANALYSIS, ON THE ERRONEOUS VIEW THAT THE ISSUE HAD ALREADY BEEN DECIDED. 16

CONCLUSION **20**

TABLE OF AUTHORITIES

Cases

Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235 (S.D.N.Y. 2004) 15, 18

Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875) 4

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192 (1997) 6

Cathedral of Joy Baptist Church v. Village of Hazel Crest, 22 F.3d 713 (7th Cir. 1994) 9

Credit Suisse Securities (USA), LLC v. Simmonds, 566 U.S. 221 (2012)............................ 8

Everly v. Everly, 958 F.3d 442 (6th Cir. 2020)......... 19

Garza v. Everly, 59 F.4th 876 (6th Cir. 2020).......... 19

George Knight & Co. v. Watson Wyatt & Co., 170 F.3d 210 (1st Cir. 1999).................................. 9

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 4

Hoste v. Radio Corp. of America, 654 F.2d 11 (6th Cir. 1981)... 16

In re General American Life Ins. Co. Sales Practices Litig., 391 F.3d 907 (8th Cir. 2004).. 9

Makedwde Pub. Co. v. Johnson, 37 F.3d 180 (5th Cir. 1994).. 14

Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010) 4, 12

Michael Grecco Prods., Inc. v. RADesign, Inc., 112 F.4th 144 (2d Cir. 2024) 7, 10

Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108 (2d Cir. 1977)..................................... 16

Netzer v. Continuity Graphic Assocs., Inc., 963 F. Supp. 1308 (S.D.N.Y. 1997) 14

Oracle America, Inc. v. Hewlett-Packard Enterprise Co., 971 F.3d 1042 (9th Cir. 2020)... 14

Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014) 2-8, 10, 13, 18-20

Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971).................................. 14, 16-18

Price v. Fox Entertainment Group, 473 F. Supp. 2d 446 (S.D.N.Y. 2007) 14

Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120 (2d Cir. 2014)..............................7, 15, 18

Rice v. Music Royalty Consulting, Inc., 397 F. Supp. 3d 996 (E.D. Mich. 2019) 14

Roley v. New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994).. 17-18

Schmidt v. Skolas, 770 F.3d 241 (3d Cir. 2014).. 8

Stokes v. Brinor, 683 F. Supp. 3d 713 (N.D. Ohio 2023)... 14-15

Stone v. Williams, 970 F.2d 1043 (2d Cir. 1992).. 17-18

Tagliente v. Himmer, 949 F.2d 1 (1st Cir. 1991).. 9

Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983).. 16-17

United States v. Kubrick, 444 U.S. 111 (1979) 4

Urie v. Thompson, 337 U.S. 163 (1949) 4

Wallace v. Kato, 549 U.S. 384 (2007) 3

Warner Chappell Music, Inc. v. Nealy, 601 U.S. 366 (2024). 2-4, 8, 19

West Virginia v. United States, 479 U.S. 305 (1987). 13

William A. Graham Co. v. Haughey, 568 F.3d 425 (3d Cir. 2009) (*Graham I*) 18-19

William A. Graham Co. v. Haughey, 646 F.3d 138 (3d Cir. 2011) (*Graham II*)............. 2, 9-13, 19

Wood v. Carpenter, 101 U.S. 135 (1879) 8

Wood v. Santa Barbara Chamber of Commerce, Inc., 507 F. Supp. 1128 (D. Nev. 1980), *aff'd*, 705 F.2d 1515 (9th Cir. 1983) 18

Statutes

17 U.S.C. § 106 5

17 U.S.C. § 501(a) 5

17 U.S.C. § 502 5

17 U.S.C. § 504(c) 5

17 U.S.C. § 507(b) 3, 6

Rules

Fed. R. Civ. P. 8(c)(1) 8

Supreme Court Rule 37 1

Other Authorities

BLACK'S LAW DICTIONARY (9th ed. 2009) 11

BALLENTINE'S LAW DICTIONARY (3d ed. 1969) 11

Calvin W. Corman, LIMITATION OF ACTIONS §§ 7.4.1, 11.1.2.1, 11.1.2.3 (1991) 3, 4

Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §12.05[B][2] (LexisNexis 2023 rev.) 15

Tyler T. Ochoa, Warner Chappel Music, Inc. v. Nealy *and the Copyright Act's Statute of Limitations*, 24 Chicago-Kent J. Intell. Prop. 98 (2025), *at* https://digitalcommons.law.scu.edu/historical/2898/........... 16-18

Charles A. Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 1056 (3d ed. 2002 & Supp. 2010) 10

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of Petitioners is submitted pursuant to Rule 37 of the Rules of this Court.[1]

Tyler T. Ochoa is a Professor with the High Tech Law Institute at Santa Clara University School of Law. Professor Ochoa is a recognized expert in U.S. copyright law: he is currently the author of annual updates to the treatise *The Law of Copyright*, by the late Howard B. Abrams. He is also a co-author (with Craig Joyce and Michael Carroll) of a widely-used law school casebook, *Copyright Law* (11th ed. 2020), and the author of the Copyright chapter in the hornbook *Understanding Intellectual Property Law* (4th ed. 2020). He has published numerous articles on copyright law, including one cited by this Court in *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003). In addition to his expertise in copyright law, he has published three articles on statutes of limitations, co-authored with Andrew J. Wistrich, U.S. Magistrate Judge, Central District of California (retired).

Professor Ochoa is an unbiased observer who does not have any financial interest in the outcome of this

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[1] No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. No person other than the *amicus* made a monetary contribution to the preparation or submission of this brief. *Amicus'* university affiliation is for identification purposes only; *amicus'* university takes no position on this case.

Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for the *amicus* provided counsel for all parties notice of *amicus*' intention to file an *amicus curiae* brief at the petition stage on February 7, 2025, which was at least 10 days prior to the due date for the *amicus curiae* brief.

litigation. The only interest he has is a scholarly interest in copyright law and statutes of limitations, and a commitment to the orderly development of both areas of law in the future.

SUMMARY OF ARGUMENT

This Court "ha[s] never decided … whether a copyright claim accrues when a plaintiff discovers or should have discovered an infringement, rather than when the infringement happened." *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 371 (2024). In addition to the reasons presented by counsel for the Petitioners, this brief sets forth three reasons why the Court should address the question now.

First, the Second Circuit's opinion in this case holds that the discovery rule is the *one and only* rule of accrual in copyright cases. That holding contradicts this Court's opinion in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), which held that the wrongful act rule is the default rule in copyright cases, without deciding whether the discovery rule was a permissible exception. Second, the Second Circuit's opinion also conflicts with the Third Circuit's opinion in *Graham II*, which held that the discovery rule is a rule of equitable tolling, rather than a rule of accrual. Even if the discovery rule is a permissible exception, the legal basis for the rule affects proper allocation of the burdens of proof. Third, the discovery rule was adopted in copyright cases mostly without analysis, based on cases that assumed fraudulent concealment would equitably toll the statute of limitations. Because the legal basis for the rule is dubious, and a circuit split already exists, the Court should grant the petition for *certiorari*.

ARGUMENT

The Question Presented in this case is "[w]hether a claim 'accrue[s]' under the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), when the infringement occurs (the 'injury rule') or when a plaintiff discovers or reasonably should have discovered the infringement (the 'discovery rule')." Twice in the past eleven years, this Court has noted but declined to address the question. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 n.4 (2014); *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 371 (2024). In addition to the reasons presented by counsel for the Petitioners, this brief explains why the Court should address the question now.

At the outset, a note on terminology is warranted. In *Petrella*, this Court stated that "[a] copyright claim . . . arises or 'accrue[s]' when an infringing act occurs." 572 U.S. at 670. It explained: "Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs." *Id*. at 671. I will refer to this as the "wrongful act" rule of accrual.

In some instances, however, a wrongful act does not immediately result in an injury. In those instances, courts typically hold that a claim does not "accrue" until the injury occurs. "Under the traditional rule of accrual ... the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages." *Wallace v. Kato*, 549 U.S. 384, 391 (2007) (quoting 1 Calvin W. Corman, Limitation of Actions §7.4.1 (1991)). I will refer to this as the "injury" rule of accrual.

Finally, in cases of fraud, this Court has held that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875); *accord*, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey*). "More recently, both state and federal courts have applied forms of the 'discovery rule' to claims other than fraud." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 645 (2010) (*citing* Corman, Limitation of Actions §§ 11.1.2.1, 11.1.2.3).[2] "And when they have done so, state and federal courts have typically interpreted the word ['discovery'] to refer not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Id*. at 645.

So what should we call the default rule of accrual described in *Petrella*, that "[a] copyright claim … arises or 'accrue[s]' when an infringing act occurs," 572 U.S. at 670? In a footnote, the Court in *Petrella* referred to the default rule of accrual as "the incident of injury rule." *Id*. at 670 n.4; *see also Warner Chappell*, 601 U.S. at 375 (dissenting opinion) (referring to "the standard incident of injury rule"); *but cf. Warner Chappell*, 601 U.S. at 373 (majority opinion) (referring to "the discovery rule" and "its opposite

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[2] For example, this Court has applied the "discovery rule" in cases involving exposure to toxic substances, where "the injurious consequences of the exposure are the product of a period of time rather than a point of time," *Urie v. Thompson*, 337 U.S. 163, 170 (1949), and medical malpractice, where the fact of injury "may be unknown or unknowable until the injury manifests itself" and the plaintiff discovers its factual cause. *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

number—an accrual rule based on the timing of an infringement."). And Petitioners follow that lead in the Petition and in the Question Presented, consistently referring to the default rule of accrual as the "injury rule."

In copyright infringement cases, however, the cause of action is complete when the wrongful act (unauthorized reproduction, distribution, public performance, or public display) has occurred, 17 U.S.C. §§106, 501(a). A copyright owner may sue for infringement and seek an injunction or statutory damages, even when no actual damages have been sustained. 17 U.S.C. §§502, 504(c). Thus, although one could characterize the allegedly infringing act itself as an "injury," perhaps it is more accurate (or at least it provides greater clarity) to refer to the default rule of accrual described in *Petrella* as a "wrongful act" rule of accrual. Otherwise, copyright owners might get the idea that the statute of limitations does not begin to run until they have sustained *actual damages*, which might not occur until months or years after the wrongful act occurs (or at all).

For this reason, I will refer to the default rule of accrual described in *Petrella* as a "wrongful act" rule of accrual (except when quoting cases). But in doing so, I am merely adopting different terminology. In copyright cases, if the alleged wrongful act is itself deemed to be an injury, the default rule that the cause of action "accrue[s] when an infringing act occurs," *Petrella*, 572 U.S. at 670, remains the same, whether it is called the "injury" rule (as in the Petition) or the "wrongful act" rule (as here).

I. THE SECOND CIRCUIT'S OPINION IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISION IN *PETRELLA*.

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014), this Court expressly held that 17 U.S.C. § 507(b) adopts a wrongful act rule of accrual:

> A claim ordinarily accrues "when [a] plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997) (internal quotation marks omitted). In other words, the limitations period generally begins to run at the point when "the plaintiff can file suit and obtain relief." *Ibid.* A copyright claim thus arises or "accrue[s]" when an infringing act occurs.

In a footnote, this Court then acknowledged that "[a]lthough 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,'" that delays or tolls the running of the limitation period. *Id*. at 670 n.4 (emphasis added). This Court also "recognized that the separate-accrual rule attends the copyright statute of limitations," so that "each infringing act starts a new limitations period." *Id*. at 671. Thus,

> [W]hen 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.

Id.

Although the Court in *Petrella* did not need to address whether the use of the discovery rule was proper, the language in *Petrella* made it clear that the wrongful act rule of accrual is the *default* rule of accrual under § 507(b); and that *if* the discovery rule can properly be used, it is only to be used as an *exception* to the wrongful act rule of accrual.

The Second Circuit's opinion in this case blatantly disregarded this Court's teaching in *Petrella*. Instead, it relied on an older Second Circuit case, decided before *Petrella*, in holding that "[t]he discovery rule is not an exception to the injury rule that only applies to some infringement claims. . . . Rather, 'the discovery rule, *not the injury rule*' determines, in the first place, when a copyright infringement claim accrues." *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 151 (2d Cir. 2024), *quoting Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (emphasis added in *Michael Grecco Prods*.). The Second Circuit criticized the district court for "treating the discovery rule as an equitable doctrine for which only some plaintiffs in some circumstances will qualify," 112 F.4th at 152, and it doubled down on its pre-*Petrella* view: "because we have previously determined that the discovery rule is Congress's intended rule of accrual for civil actions under the Copyright Act, it is the rule in *every* such action and *not* an equitable exception to the injury rule." *Id*. (emphasis added), *citing Psihoyos*, 748 F.3d at 124.

This error is not only inconsistent with *Petrella*, it also affects the proper allocation of the burdens of proof. The expiration of a statute of limitations is an affirmative defense that the defendant must plead

and prove. Fed. R. Civ. P. 8(c)(1). If the discovery rule is the *only* rule of accrual, as the Second Circuit erroneously asserted below, then the defendant has the burden of proving that the plaintiff reasonably should have discovered the alleged infringement more than three years before filing. But if the wrongful act rule is the rule of accrual, as this Court held in *Petrella*, then the defendant only has the burden of proving that the alleged infringement *occurred* more than three years before filing. An objective standard like the wrongful act rule is simple to apply; whereas the discovery rule involves fact questions that cannot easily be resolved at the early stages of litigation.

Moreover, even if the discovery rule is a permissible *exception* to the wrongful act rule of accrual (the question this Court left open in *Petrella* and *Warner Chappell*), the burden on the defendant should remain the same as under the wrongful act rule. Generally, if a defendant shows the alleged wrongful act occurred more than three years before filing, the burden then shifts to the *plaintiff* to prove that it reasonably could not have discovered the relevant facts until less than three years before filing. *See, e.g.*, *Credit Suisse Securities (USA), LLC v. Simmonds*, 566 U.S. 221, 227 (2012) ("Generally, a litigant seeking equitable tolling bears the burden of establishing … that he has been pursuing his rights diligently"); *Wood v. Carpenter*, 101 U.S. 135, 141 (1879) ("A party seeking to avoid the bar of the statute [of limitations] on account of fraud must aver and show that he used due diligence to detect it").[3]

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[3] Lower courts have applied this general rule in a wide variety of cases. *See, e.g.*, *Schmidt v. Skolas*, 770 F.3d 241, 251

II. THERE IS ALREADY A SPLIT IN THE LOWER COURTS CONCERNING THE LEGAL BASIS FOR THE DISCOVERY RULE.

Although the Courts of Appeals are seemingly unanimous in adopting the discovery rule in copyright cases, closer examination reveals that they have very different conceptions of the legal basis for the discovery rule, leading to differences in how it should be applied.

In *William A. Graham Co. v. Haughey*, 646 F.3d 138 (3d Cir. 2011) (*Graham II*), the Third Circuit expressly held that the discovery rule is *not* a rule of accrual; instead, it is a rule of equitable tolling. *Id*. at 150 ("Since it cannot be an accrual doctrine, the discovery rule must instead be one of those legal precepts that operate to toll the running of the

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(3d Cir. 2014) ("Generally, the plaintiff bears the burden of showing that the discovery rule tolls the statute of limitations.") (breach of fiduciary duty); *In re General American Life Ins. Co. Sales Practices Litig*., 391 F.3d 907, 912 (8th Cir. 2004) ("In order to invoke the discovery rule, a party bears the burden of showing that it could not discover its injury despite the exercise of 'reasonable diligence.'") (negligence, fraud, and unfair trade practices); *George Knight & Co. v. Watson Wyatt & Co.*, 170 F.3d 210, 213 (1st Cir. 1999) ("The burden is on [the plaintiff] to prove that it lacked knowledge or that, in the exercise of reasonable diligence, it could not have known about the [claim] within the statute of limitations.") (ERISA); *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 717 (7th Cir. 1994) (plaintiff "has the burden of showing that it falls within the exception" of the discovery rule) (§1983 claim); *Tagliente v. Himmer*, 949 F.2d 1, 5 (1st Cir. 1991) ("The burden is on the plaintiff to prove that in the exercise of reasonable diligence she could not have known of the misrepresentation within the statute of limitations.").

limitations period after a cause of action has accrued"). In its opinion in this case, however, the Second Circuit expressly disagreed, stating that "the discovery rule is the rule of accrual, *not* an equitable tolling . . . doctrine." *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 151 (2d Cir. 2024) (emphasis added).

The Third Circuit's view leads to the conclusion that "[t]he [discovery] rule is an *exception* to the usual principle that the statute of limitations begins to run immediately upon accrual regardless of whether or not the injured party has any idea what has happened to him." *Graham II*, 646 F.3d at 150 (emphasis added). The Second Circuit's view leads to the conclusion that "[t]he discovery rule is *not* an exception to the injury rule that only applies to some infringement claims; it is not a benefit for which only some plaintiffs qualify. Rather, 'the discovery rule, *not the injury rule*' determines, in the first place, when a copyright infringement claim accrues." *Michael Grecco Prods.*, 112 F.4th at 150 (emphasis added in *Grecco*). As explained above, the Second Circuit's holding is fundamentally inconsistent with this Court's opinion in *Petrella*, which characterized the discovery rule "as *an alternative to* the incident of injury rule" that ordinarily applies to copyright claims. *Petrella*, 572 U.S. at 670 n.4 (emphasis added).

The Third Circuit explained that:

> The discovery rule has been characterized both as delaying the accrual of a cause of action and as tolling the running of the limitations period. See 4 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1056 & nn. 43.1–43.2 (3d ed. 2002 & Supp. 2010). The

> distinction between the two concepts is "often confusing," *id*., but because it [often] makes no difference for purposes of deciding whether a claim survives a statute-of-limitations defense, the question has rarely been analyzed with semantic precision.

Graham II, 646 F.3d at 148.

The Third Circuit carefully analyzed the question with semantic precision. First, it explained the meaning of "accrue":

> As a general matter, a cause of action "accrues" when it has "come into existence as an enforceable claim or right." BLACK'S LAW DICTIONARY (9th ed. 2009). Stated another way, accrual is "[t]he event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action." BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

Id. at 146. It then explained how "accrual" differs from "tolling":

> Accrual . . . occurs once events satisfying all the elements of a cause of action have taken place. At that point, the period prescribed by the applicable statute of limitations ordinarily begins to run. . . . There exist, however, various statutory and judge-made rules that operate to toll the running of the limitations period—that is, "to stop [its] running"; "to abate" it, BLACK'S LAW DICTIONARY (9th ed.), *supra,* or "[t]o suspend or interrupt" it, BALLENTINE'S LAW DICTIONARY, *supra*. . . . Time that passes

> while a statute is tolled does not count against the limitations period.

Id. at 147-48.

The Third Circuit then explained that although many courts have glossed over the distinction,[4] the discovery rule is better characterized as a rule of equitable tolling:

> Accrual happens at the moment when events fulfilling all the elements of a cause of action have transpired. . . . In order to defer accrual, the discovery rule would have to add an additional component to the substantive definitions of the claims to which it applies. That simply cannot be right. Rules regarding limitations periods do not alter substantive causes of action. Accordingly we do not think the discovery rule should be read to alter the date on which a cause of action accrues.
>
> Since it cannot be an accrual doctrine, the discovery rule must instead be one of those legal precepts that operate to toll the running of the limitations period after a cause of action has accrued, as sundry cases have stated. [Collecting cases] . . . This conclusion fits with the usual definitions of "toll" and "accrue," as we have explained. . . .

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[4] *Id*. at 148-49 (collecting and criticizing cases, dismissing them as "nonbinding obiter dicta"). The Third Circuit acknowledged that "[e]ven the Supreme Court has on occasion confused the two concepts," and it explained why this Court's "statement regarding the discovery rule" in *Merck & Co. v. Reynolds,* 559 U.S. 633, 644 (2010), was "neither technically accurate nor necessary to its holding." *Graham II*, 646 F.3d at 149.

Id. at 149-50. Consequently, it concluded:

> We hold that the "accrual" of a cause of action occurs at the moment at which each of its component elements has come into being as a matter of objective reality. . . . The federal discovery rule then operates *in applicable cases* to toll the running of the limitations period.

Id. at 150-51 (emphasis added).

Why does this careful semantic distinction make a difference?[5] It matters because 1) the Copyright Act's statute of limitations uses the word "accrued"; 2) this Court in *Petrella* interpreted the word "accrued" in accordance with the ordinary dictionary definition, just as the Third Circuit did in *Graham II*; 3) both *Petrella* and *Graham II* characterize the discovery rule as an *exception* (or "*alternative*") to the wrongful act rule of accrual, one that only operates "*in applicable cases*"; and 4) in this case, the Second Circuit expressly stated to the contrary that the discovery rule applies in *all* copyright cases, rather than only in some (or in none). It also matters because, as explained in Part I above, the proper allocation of the burdens of proof turns on whether the discovery rule is the one and only rule of accrual (as the Second

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[5] In *William A. Graham*, it made a difference because this Court had stated that prejudgment interest should be awarded "*from the time the claim accrues* until judgment is entered." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) (emphasis added). It was therefore important to determine whether the discovery rule delayed the "accrual" of a claim, or whether it merely "tolled" the limitations period.

Circuit said below) or whether it is an exception that only applies in certain cases, or not at all.

The general rule that the plaintiff bears the burden of demonstrating reasons for equitable tolling, including fraudulent concealment, has been applied in copyright cases. *See Oracle America, Inc. v. Hewlett-Packard Enterprise Co.*, 971 F.3d 1042, 1048 (9th Cir. 2020) ("A plaintiff relying on [fraudulent concealment] to toll the limitations period must show … that the plaintiff was, in fact, ignorant of the existence of his cause of action.") (internal quotes and citation omitted); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340 (5th Cir. 1979) ("once a defendant has shown that a claim is time barred [under the wrongful act rule] …, it is incumbent upon the plaintiff … to come forward and demonstrate that for some equitable reason the statute should be tolled in his case."); *accord*, *Makedwde Pub. Co. v. Johnson*, 37 F.3d 180, 182 n.4 (5th Cir. 1994). Some district courts have also applied the general rule to other reasons for equitable tolling, placing the burden on the copyright owner to show justifiable ignorance of its claim, despite exercising reasonable diligence.[6]

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[6] *See, e.g.*, *Rice v. Music Royalty Consulting, Inc.*, 397 F. Supp. 3d 996, 1012 (E.D. Mich. 2019) ("plaintiff bears the burden of showing that he is entitled to equitable tolling" for mental illness and lack of discovery); *Price v. Fox Entertainment Group*, 473 F. Supp. 2d 446, 458 (S.D.N.Y. 2007) (plaintiff bears the burden of showing justifiable ignorance and diligence); *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1316 (S.D.N.Y. 1997) ("A plaintiff seeking to invoke [equitable tolling] is also required to demonstrate that his ignorance is not attributable to a lack of diligence on his part."). *But cf. Stokes v.*

If the Third Circuit is correct that the discovery rule is a rule of equitable tolling, then the plaintiff should bear the burden of showing that it was unable to reasonably discover the claim until less than three years before filing, despite the exercise of reasonable diligence. *Cf. Auscape Int'l v. National Geographic Society*, 409 F. Supp. 2d 235, 248 (S.D.N.Y. 2004) ("a claim for copyright infringement accrues on the date of the infringement. Accordingly, plaintiffs' claims … are untimely unless plaintiffs have raised a triable issue of fact … [that] would toll running of the statute for a sufficient period.").[7] But if the Second Circuit is correct that the discovery rule is the *one and only* rule of accrual in copyright cases, and that the defendant bears the burden of showing that the plaintiff reasonably could not have discovered its claim more than three years before filing, then only this Court can revisit and revise its statements in *Petrella* that the wrongful act rule is the default rule of accrual, and that the discovery rule is only an "alternative."

Brinor, 683 F. Supp. 3d 713, 719 (N.D. Ohio 2023) ("As an affirmative defense, the defendant carries the burden of showing that the statute of limitations period has expired, after which the burden shifts to the plaintiff to establish that an exception applies."; but declining to treat the discovery rule as an exception).

[7] In later rejecting Judge Kaplan's conclusion, the Second Circuit did not grapple with his reasoning; rather, it simply deferred to the holdings of the other Circuits. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124-25 (2d Cir. 2014). *See also* 3 Nimmer on Copyright, §12.05[B][2][b] ("Although only a district court opinion, *Auscape* represents a fine articulation of how to compute the Copyright Act's statute of limitations…. [*Psihoyos*] eliminates Judge Kaplan's ruling as a matter of *stare decisis*. But the circuit's failure to grapple with his logic leaves the rationale undergirding *Auscape* unassailed.").

III. THE DISCOVERY RULE WAS ADOPTED MOSTLY WITHOUT ANALYSIS, ON THE ERRONEOUS VIEW THAT THE ISSUE HAD ALREADY BEEN DECIDED.

The first Courts of Appeals to apply the Copyright Act's statute of limitations used the wrongful act rule of accrual. *See Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108, 1111 (2d Cir. 1977) ("Any infringement more than three years before the commencement of the action … is barred by limitations") (citation omitted); *Hoste v. Radio Corp. of America*, 654 F.2d 11, 11 (6th Cir. 1981) (allowing action to proceed only for acts occurring within three years before action was filed in 1978).[8] In one case, the court rejected the "blameless ignorance" doctrine, a state-law version of the discovery rule. *See Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 339-40 (5th Cir. 1971). The *Prather* court assumed that the limitations period would be tolled if the plaintiff could show fraudulent concealment; but the court found that the plaintiff was on notice more than three years before filing, so that the claim was time-barred. 446 F.2d at 340-41. And in *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983), the court mused that the discovery rule might apply,[9] but it held that "[i]n any event, there is no doubt that the

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[8] Most District Courts agreed. *See* Tyler T. Ochoa, Warner Chappel Music, Inc. v. Nealy *and the Copyright Act's Statute of Limitations*, 24 Chicago-Kent J. Intell. Prop. 98, 106 n.52 (2025), *available at* https://digitalcommons.law.scu.edu/historical/2898/.

[9] 712 F.2d at 1117-18 ("the tendency in modern law is to toll the statute of limitations until the victim could reasonably have discovered the cause of his woe. . . . *Although we cannot find a copyright case on point*, a similar principle may apply in such cases.") (emphasis added).

copyright statute of limitations is tolled by 'fraudulent concealment' of the infringement," *id.* at 1118 (citing *Prather*).[10]

Many copyright cases applying the discovery rule trace their lineage to *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992), in which the plaintiff learned that she was the illegitimate daughter of deceased country singer Hank Williams, Sr. Based in part on a state-court finding of fraudulent concealment, the court held that "the statute of limitations did not begin to run until plaintiff had reason to know of the facts giving rise to her statutory entitlement, *i.e.*, that she was a child of Williams." *Id*. at 1048. It found, however, that the plaintiff had such knowledge nearly six years before she filed suit. *Id*. at 1048-49. As a result, ultimately it held that "[r]ecovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts." *Id*. at 1049-50.

Two years later, the Ninth Circuit adopted the discovery rule without analysis, by mistake. In *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994), it stated flatly: "A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge." The single case that it cited for that proposition was a

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[10] More controversial was *Taylor*'s additional holding that a plaintiff could recover damages for acts that occurred *more* than three years before suit was filed *even if* it was aware of the earlier infringements, as long as "the final act of an unlawful course of conduct occurs within the statutory period." 712 F.2d at 1119. This "continuing infringement" theory was widely criticized and was rejected by other courts; and ultimately it was rejected in the Seventh Circuit as well. *See* Ochoa, *supra* note 8, at 113 & nn. 95-96.

district court decision that (like *Prather*) applied the wrongful act rule of accrual and *rejected* a claim of fraudulent concealment. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1134-36 (D. Nev. 1980), *aff'd*, 705 F.2d 1515, 1521 (9th Cir. 1983). Moreover, because plaintiff *had* discovered its claim more than four years before filing, ultimately *Roley* held that "[i]n a case of continuing copyright infringements, an action may be brought for all acts that accrued within the three years preceding the filing of the suit." 19 F.3d at 481.

Thus, the discovery rule did not affect the outcome in either *Stone* or *Roley*. Both cases would have come out exactly the same way under *Petrella*. Nonetheless, from those two foundational cases, the discovery rule spread to the other Circuits. *See* Ochoa, *supra* note 8, at 114, 118-20.

The only two cases to carefully consider whether Congress intended the discovery rule to apply in copyright cases reach opposite conclusions. In *Auscape International v. National Geographic Society*, 409 F. Supp. 2d 235, 244-47 (S.D.N.Y. 2004), Judge Lewis Kaplan concluded that Congress likely intended a wrongful act rule of accrual, rather than the discovery rule.[11] In *William A. Graham Co. v. Haughey*, 568 F.3d 425 (3d Cir. 2009) (*Graham I*), the Third Circuit reached the opposite conclusion. In so holding, it relied heavily on its default rule that "[i]n the absence of a contrary directive from Congress, we apply the federal discovery rule." 568 F.3d at 434. The default

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[11] As noted above, the Second Circuit later rejected *Auscape* without substantively engaging with its reasoning. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124-25 (2d Cir. 2014); Note 7, above.

rule in *Graham I* contradicts this Court's subsequent holding in *Petrella* (and numerous other cases) that the wrongful act rule (or the injury rule) is the default rule of accrual. Moreover, as discussed in Part II above, the Third Circuit later held in *Graham II* that the discovery rule is *not* a rule of accrual, but is instead a rule of equitable tolling. 646 F.3d 138, 149-51 (3d Cir. 2011). Nonetheless, *Graham II* has not caused the Third Circuit to reconsider its holding that the discovery rule applies in copyright cases.

The issue will not go away anytime soon. Already, three members of this Court have questioned whether the discovery rule applies. *See Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 374-76 (2024) (Gorsuch, J., joined by Thomas and Alito, JJ., dissenting). In addition, at least one Circuit Judge has called for a fresh look at the question. *See Garza v. Everly*, 59 F.4th 876, 885 (6th Cir. 2020) (Murphy, J., concurring) *Everly v. Everly*, 958 F.3d 442, 465 (6th Cir. 2020) (Murphy, J., concurring). If the issue is allowed to fester, thousands of hours and hundreds of thousands of dollars will be spent litigating this collateral issue until an inevitable Circuit split requires this Court to resolve it, one way or the other.

This Court "ha[s] never decided … whether a copyright claim accrues when a plaintiff discovers or should have discovered an infringement, rather than when the infringement happened." *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 371 (2024). This Court should grant *certiorari* and resolve the issue now, to avoid months or years of legal uncertainty.

CONCLUSION

The discovery rule of accrual was adopted in copyright cases mostly without analysis, based on cases that assumed fraudulent concealment would equitably toll the statute of limitations. The Second Circuit's opinion in this case holds that the discovery rule is the *one and only* rule of accrual in copyright cases. That holding contradicts this Court's opinion in *Petrella*, which held that the wrongful act rule is the default rule in copyright cases; and it conflicts with the Third Circuit's opinion in *Graham II*, which held that the discovery rule is a rule of equitable tolling, rather than a rule of accrual. Because a circuit split already exists, the Court should grant the petition for *certiorari*.

Respectfully submitted,

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