No. 21-55379

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STARZ ENTERTAINMENT, LLC,

Plaintiff-Appellee,

v.

MGM DOMESTIC TELEVISION DISTRIBUTION LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California, Western Division
No. 2:20-cv-04085
The Honorable Dolly M. Gee, District Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Starz Entertainment, LLC ("Starz") states that it is a wholly owned subsidiary of Lions Gate Entertainment Corp., which is a publicly held corporation, and that no other publicly held corporation owns 10% or more of its stock.

Dated: October 27, 2021

CRAVATH, SWAINE & MOORE LLP

s/ J. Wesley Earnhardt
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INTRODUCTION

This appeal raises a simple question: when a copyright holder discovers previously unknown instances of infringement and sues upon them promptly, such that her civil claims are brought within three years of when they accrued, can she recover damages for those infringements under the Copyright Act? The answer to that question is governed by the text of the Copyright Act itself, which makes clear that civil actions for copyright infringement (including those seeking damages) are timely so long as they are brought within three years of when the claims accrued. Despite the text of the Copyright Act speaking directly to the issue presented by its appeal, MGM mentions that text only once, in passing, in its Opening Brief.

But the language of the statute should be where the analysis starts and ends, and not a mere afterthought. The statute of limitations for civil actions under the Copyright Act provides in its entirety: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim ***accrued***." 17 U.S.C. § 507(b) (emphasis added). The parties agree that each act of infringement gives rise to a separate "claim". The parties also agree that a "claim" does not "accrue" until the act of infringement giving rise to it is discovered (or should have been discovered) by the copyright holder. As MGM puts it, "the discovery rule continues to apply to determine when a claim accrues".

(Appellant's Br. 3.) Thus, under the Copyright Act, a claim for copyright infringement is timely so long as the civil action asserting the claim is commenced within three years of the plaintiff's actual or constructive discovery of the infringing act giving rise to the claim.

Rather than address the governing statute, MGM spends its Opening Brief misreading and misusing several out-of-context statements from *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014). But, as the District Court correctly ruled, *Petrella* has no bearing on the issue presented here.

In *Petrella*, the Supreme Court confirmed that the Copyright Act means what it says. There, the copyright holder was aware that MGM had engaged in numerous acts of infringement over nearly two decades. *Id.* at 674-75. Given her awareness of MGM's conduct, she did not dispute that she had constructive knowledge of each act of infringement as it occurred, meaning that each claim accrued immediately upon the act of infringement giving rise to it. *See id.* at 675-76. But, because each act of infringement gave rise to an entirely new claim, she argued that claims based on infringements that had occurred within the preceding three years necessarily were timely. It was irrelevant, she argued, that other claims, based on infringements that had occurred more than three years before, were untimely—because her lawsuit did not involve those earlier claims. In response, MGM argued that because the copyright holder had elected not to sue

for earlier acts of infringement, the doctrine of laches barred all claims, even claims that had accrued during the preceding three years.

The Supreme Court rejected MGM's argument, holding that a copyright holder has three years from the date on which each individual claim accrues to bring suit on that particular claim; laches cannot be used to shorten (let alone eliminate) the three year statutorily prescribed period. *Id.* at 667. That is a fair result, the Supreme Court explained, in part because each earlier-accrued claim ***had expired*** when the three-year period ran without the copyright holder commencing suit on it. *Id.* at 677-78. In that way, due to the "separate accrual rule", "the copyright statute of limitations, 17 U.S.C. § 507(b), itself takes account of delay." *Id.* at 677. Those are the teachings of *Petrella*.

Because *Petrella* was a case about laches, it was not a case about the discovery rule. Laches and the discovery rule are mutually exclusive. In a laches case, the plaintiff necessarily is charged with knowledge of the infringing acts—it is precisely that knowledge and failure to sue that gives rise to laches—which means that each infringing act causes a copyright claim to accrue immediately. In that context, then, infringement and accrual happen at the same time and are synonymous; there is no work for the discovery rule to do. In a discovery rule case, however, an infringement occurs (and damages from that infringement mount) ***before*** the claim accrues—precisely because the copyright holder had not

yet actually or constructively discovered the infringement. Even before *Petrella*, there was no laches defense in such a case. Thus, the Supreme Court had no occasion to address the discovery rule in *Petrella*—because *Petrella* was a laches case, not a discovery rule case.

In the present appeal, MGM divorces the language of *Petrella* from its context in an effort to invent a new rule flatly inconsistent with the words of Section 507(b). That statutory language bears repeating: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). From this language—which speaks broadly of a "civil action" and makes no mention of damages—MGM fashions two distinct rules: (i) one rule establishing a deadline for "the filing of suit" and (ii) another separate (unwritten) rule establishing a damages bar that prohibits recovery outside a purported three-year look-back period, "even where" the underlying claim is timely. (Appellant's Br. 27.) This supposed bifurcation of the Copyright Act's limitations period appears nowhere in the statutory text; it cannot be squared with Supreme Court or Ninth Circuit precedent; it has been rejected by the vast majority of courts to have considered it; it would upend the long-standing public policy behind the Copyright Act's limitations period; and it makes no practical sense.

First, MGM's position is belied by straightforward principles of statutory construction. Neither Section 507(b) (the statute of limitations under the Copyright Act) nor Section 504 (the provision of the Act governing damages) hints at a three-year damages bar. In fact, there is no mention of a damages bar ***anywhere*** in the statutory text. Section 507(b) does not purport to create more than one rule—let alone one rule for liability in all cases and a different rule that applies to damages claims based on infringements that occurred more than three years before suit. The statute's words are clear. "[C]ivil action[s]", as a whole, are timely under the Copyright Act if they are commenced within three years of when the claims "accrued". (Appellant's Br. 3.) Here, Starz's claims indisputably accrued in 2019, when it first learned that MGM had licensed to third parties titles belonging exclusively to Starz. Starz sued within a year. As a result, each of Starz's claims is timely under the Copyright Act's plain meaning.

Nor does Section 504—the provision of the Copyright Act that controls the calculation of damages—provide for any such damages bar. To the contrary, it allows recovery for "*any* profits . . . attributable to the infringement", 17 U.S.C. § 504(b) (emphasis added), and "statutory damages for *all* infringements involved in the action", *id*. § 504(c) (emphasis added). Had Congress intended to impose a narrower, three-year limit on these measures of recovery, it certainly would have said so, and it would have been reflected in Section 504.

Second, nothing in *Petrella* requires the interpretation MGM posits. The Supreme Court in *Petrella* did not say it was announcing a new damages bar previously unidentified in the statute. Nor did the Court attempt to square any such damages bar with the discovery rule, which it acknowledged "the overwhelming majority of courts" apply in copyright cases. *Petrella*, 572 U.S. at 670 n.4. The Court did not attempt to explain how the supposed damages bar could be derived from the text of the Copyright Act or grapple with the many decades of precedent that such a rule would be overturning. The Supreme Court did not do any of the things one would expect if it was overturning decades of settled law in a majority of the Circuits. The reason it did not do any of those things is because, contrary to MGM's arguments, it did not create a new damages bar.

The language from *Petrella* that MGM relies upon in an effort to establish a groundbreaking new copyright damages bar actually does no more than recite the plain meaning of Section 507(b) in the injury rule context presented by *Petrella*, a fact pattern in which a copyright holder is on notice of each infringement, and accrual therefore happens immediately upon each new infringing act. One can determine all timely claims and damages in such a case by looking back three years from the date of the complaint to identify the infringements/accruals that happened during those preceding three years. The same procedure cannot be used to determine the extent of liability in a discovery

rule case. In a discovery rule case, accrual happens, by definition, ***after*** the infringing act. A court can look back three years from the date of the complaint to identify the timely ***accruals***, but then the court needs to look back further to determine when the previously undiscovered infringements occurred and what damages were caused by them.

That is precisely how the Ninth Circuit has interpreted the Copyright Act for decades. Although the Supreme Court in *Petrella* overruled the Ninth Circuit's laches jurisprudence in Copyright Act cases, it left undisturbed its statute of limitations jurisprudence. In fact, by applying the "separate accrual rule", the Supreme Court adopted this Court's holding in *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994). And it did not reach, much less overrule, this Court's interpretation of *Roley* in *Polar Bear Productions v. Timex Corporation*, 384 F.3d 700, 706 (9th Cir. 2004), which concluded "that § 507(b) permits damages occurring outside of the three-year window, so long as the copyright owner did not discover—and reasonably could not have discovered—the infringement before the commencement of the three-year limitation period". Rather than overruling decades of Ninth Circuit precedent *sub silentio*, *Petrella* is fully consistent with it. As the District Court correctly observed, the "remarks" from *Petrella* quoted by MGM "do not affect the Ninth Circuit's discovery rule,

and adopting the rule that MGM proposes would eviscerate long-standing Ninth Circuit precedent unnecessarily". (1-ER-9.)

Virtually every court to consider MGM's reading of *Petrella* has rejected it. At last count nearly 30 opinions from around the country have rejected MGM's proposed rule. The most notable exception is the Second Circuit's decision in *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020). But *Sohm* is an outlier; it has been widely criticized; its reasoning is faulty and based on a fundamental misunderstanding of the circumstances presented in *Petrella*; and its existence is a reason for this Court firmly and squarely to reject MGM's argument, not a basis to follow an erroneous decision merely because the Second Circuit happened to speak first.

Third, as multiple courts have held, MGM's position would eviscerate the discovery rule. Where application of the discovery rule is necessary for a Copyright Act claim to survive (*i.e.*, the infringement occurred more than three years before suit was filed), it would mandate no relief of *any* kind for that claim. MGM asserts that a copyright owner who discovers that her rights were infringed more than three years ago could still sue for prospective relief. Not so. Any plaintiff who seeks prospective relief must show ongoing or future harm and, therefore, would not rely on the discovery rule in the first instance. The discovery rule exists so that copyright holders are not unfairly punished by having their

damages extinguished for failure to file suit when they did not know they had a claim. MGM's proposed rule, on the other hand, would leave copyright holders without any meaningful relief for copyright infringements that were reasonably discoverable only after the fact. It would unjustly incentivize copyright infringers, effectively granting them free reign to exploit content they do not own so long as their efforts at concealment are effective. Neither the Copyright Act nor the Supreme Court's decision in *Petrella* allows that illogical result.

The Order of the district court should be affirmed.

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court correctly held that the Copyright Act permits damages as a remedy for all claims that accrue no more than three years before suit.

BACKGROUND

Starz creates original content and licenses movies and television series episodes from studios, primarily on an exclusive basis, and packages that content together as premium subscription video programming. (2-ER-27–28.) MGM is an entertainment company that controls the right to distribute feature films and television series episodes, which it licenses to third parties, such as Starz, for defined periods of time under specific conditions. (2-ER-24–25.)

A. The Library Agreements

This case involves two licensing agreements (the "Library Agreements") between Starz and MGM (the "Parties"). (3-ER-92–112; 3-ER-168–88.) The Parties entered into the first Library Agreement on July 26, 2013 (the "2013 Library Agreement") (3-ER-92–112), and the second on May 7, 2015 (the "2015 Library Agreement") (3-ER-168–88). The two Library Agreements provided Starz with the exclusive copyright to exhibit 585 movies and 176 television series episodes (the "Pictures") for specified time periods on pay television and subscription video on demand ("SVOD") services in the United States and its territories and Bermuda. (2-ER-32.) In exchange for those exclusive rights and licenses, Starz agreed to pay MGM nearly $70 million over the life of the Library Agreements. (*Id.*) Because it would be impossible to monitor MGM's exclusivity compliance across numerous media platforms and hundreds of different titles, Starz bargained for and received contractual warranties that MGM had not and would not exhibit or license the Pictures to third parties for exhibition in violation of Starz's exclusive rights. (2-ER-30–32.)

B. Starz's Discovery of MGM's Infringing Acts

Starz first became aware that MGM had infringed Starz's exclusive rights under the Library Agreements in August 2019, after one of Starz's employees discovered that the film *Bill & Ted's Excellent Adventure* was available

to stream on Amazon Prime during what should have been a period of Starz's exclusivity. (2-ER-25–26.) Starz promptly notified MGM of the infringement, which MGM admitted was a violation of Starz's rights. (2-ER-26.) On September 11, 2019, MGM assured Starz that it had identified the source of the issue, a defect in its rights tracking system, which caused MGM to license Pictures in violation of Starz's rights. (2-ER-34–36.)

On September 30, 2019, MGM provided Starz with a list of 22 Pictures that MGM acknowledged having infringed. (2-ER-34–35.) Starz asked MGM on October 18, 2019, for assurances that MGM had not licensed any additional Pictures to third parties and that MGM would take affirmative measures to ensure that MGM would not license any additional Pictures to third parties in violation of Starz's rights. (2-ER-35.) In response, on November 1, 2019, MGM identified an additional 244 Pictures that it had licensed to third parties in violation of Starz's exclusive rights. (*Id.*) After conducting its own extensive investigation, Starz uncovered nearly 100 additional Pictures that MGM had impermissibly licensed to third parties. (2-ER-36.)

C. District Court Proceedings

On May 4, 2020, Starz filed a Complaint in the United States District Court for the Central District of California, asserting 1,020 causes of action under

the Copyright Act, one count for breach of contract, and one count for breach of the covenant of good faith and fair dealing. (2-ER-22–70.)

On July 6, 2020, MGM moved to dismiss all but one of Starz's copyright infringement claims, arguing (i) that *Petrella* imposed a strict three-year bar that precluded any damages recovery for the Pictures whose license periods expired more than three years prior to the filing of the Complaint and (ii) that prospective relief was not available because the license to each of those Pictures had expired. (1-ER-4–5; Def.'s Mot. Dismiss, D.Ct. ECF No. 24 at 2-3; Def's Reply Supp. Mot. Dismiss, D.Ct. ECF No. 36 at 3-21.) Starz filed a response in opposition on August 10, 2020, in which it argued that its claims were not time-barred because, as alleged in Starz's Complaint, Starz did not know and could not reasonably have known of MGM's infringements until it discovered in August 2019 that its exclusive license to *Bill & Ted's Excellent Adventure* had been infringed. (Pl.'s Mem. Opp'n Mot. Dismiss, D.Ct. ECF No. 35 at 7-15.)

On January 5, 2021, the district court denied MGM's motion. (1-ER-1–16.) In a well-reasoned decision, the district court first observed that:

> "District courts in the Ninth Circuit and elsewhere [have] largely rejected [MGM's] theory, deciding that because *Petrella* dealt with the availability of laches in cases *within* the three-year window, and because it expressly declined to pass on the question of the discovery rule, any statement regarding the availability of damages *outside* the window was either dicta or otherwise had no effect on the discovery rule."

(1-ER-7–8 (collecting cases).) The district court then considered the statements from *Petrella* now relied upon by MGM:

> "[T]he statements in *Petrella* are not non-precedential *dicta* insofar as they set forth the rolling approach to the statute of limitations in a non-discovery rule case. But it is also true that they do not affect the Ninth Circuit's discovery rule, and adopting the rule that MGM proposes would eviscerate long-standing Ninth Circuit precedent unnecessarily."

(1-ER-9.) The district court explained:

> "[T]he rolling approach has been the law in the Ninth Circuit at least since *Roley*, long before *Petrella*. . . . In fact, in *Roley*, the Ninth Circuit already declared that 'the statute bars recovery on any claim for damages that accrued more than three years before *commencement of suit*.' . . .
>
> The Supreme Court explicitly declined to 'pass[ ] on the question' of the discovery rule in *Petrella*, 572 U.S. at 671 n.4, 134 S.Ct. 1962. So, the 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. It merely reaffirmed the rolling approach's 'general' bar to recovery for infringements outside the three-year period, while letting stand the Ninth Circuit's exception for the discovery rule."

(1-ER-10.)

The district court observed that the application of MGM's rule would leave the discovery rule "hollow" and without any "real independent effect". (1-ER-11.) The district court concluded:

> "[T]his Court need not force a rule with such 'doctrinal tension' when the Ninth Circuit provides—indeed, requires—a more harmonious solution: a three year damages bar except when the plaintiff reasonably was not aware of the infringements at the time they occurred."

(1-ER-11–12.)

On January 22, 2021, MGM moved for an order certifying the district court's denial of MGM's motion to dismiss for interlocutory appeal in the Ninth Circuit. (Def.'s Mot. Certification, D.Ct. ECF No. 40.) MGM sought immediate appeal on the single issue of "whether *Petrella* limits copyright infringement damages to three years prior to filing suit irrespective of which rule of accrual applies". (*Id.* at 3.) Although the district court expressed confidence that "its decision is faithful to both Ninth Circuit and Supreme Court precedent" and "is consistent with the majority of district courts both within and outside of the Ninth Circuit", the district court certified its order denying MGM's motion to dismiss for interlocutory appeal on February 22, 2021. (2-ER-20.) On April 19, 2021, this Court granted MGM's request for permission to file an interlocutory appeal. (2-ER-71.)

SUMMARY OF THE ARGUMENT

The district court correctly denied MGM's motion to dismiss by faithfully applying the plain language of Section 507(b) and the law as prescribed by this Court and the Supreme Court of the United States.

I. Starz's claims are timely under the plain language of Section 507(b), which states that civil actions under the Copyright Act may be maintained so long as they are "commenced" within three years of when the "claim accrued". 17 U.S.C. § 507(b). It is well settled—and MGM does not contest—that "accru[al]" refers to the date on which the plaintiff discovered the infringement or reasonably should have discovered the infringement. (Appellant's Br. 3.) Because Starz commenced suit well within three years of discovering the relevant infringements, its claims are timely. Nothing in the text of Section 507(b) or Section 504 (which governs the available damages under the Copyright Act) distinguishes between retroactive or prospective relief; nothing dissociates the issue of accrual from the nature of available relief; and nothing imposes the absolute three-year damages bar for which MGM advocates. (*Infra* Section I.)

II. *Petrella* did not create a new, freestanding rule limiting the availability of damages in Copyright Act cases. Rather, it involved a straightforward application of Section 507(b) as written.

Petrella considered whether a defendant could rely on laches to ***shorten*** the limitations period in circumstances where a plaintiff knew of infringing conduct and was alleged to have unreasonably delayed in bringing suit. 572 U.S. at 667. The Supreme Court held that Section 507(b) means what it says—a copyright holder has up to three years to file suit after each separate claim accrues. *Id.* Laches cannot be used to curtail that period. *Id.*

The question here is different: Whether a defendant (again MGM) can rely on Section 507(b) to dismiss Copyright Act claims—where it is undisputed that the claims were discovered and thus "accrued" within the three-year statutory period—on the basis that the infringing acts and resultant damages occurred outside the three-year statutory period. *Petrella* did not pass on this issue—this question involves application of the discovery rule, and *Petrella* was not a discovery rule case. But Section 507(b) again means what it says: a civil action is timely so long as it is commenced within three years of when the "claim accrued". 17 U.S.C. § 507(b). *Petrella*'s general observation that a copyright plaintiff may not recover damages predating the three-year limitations period is simply a restatement of Section 507(b)'s plain language: a copyright holder cannot maintain a claim that *accrued* more than three years before suit. The Ninth Circuit's controlling precedent in *Polar Bear* remains good law. The vast majority of courts to have considered this question have rejected MGM's interpretation of

Petrella, notwithstanding the Second Circuit's ruling in *Sohm*, which was wrongly decided and has been widely criticized. (*Infra* Section II.)

III. MGM's interpretation of *Petrella* would eviscerate the discovery rule and undermine the public policy considerations that led to its adoption. While MGM argues that the discovery rule continues to permit plaintiffs to bring claims for prospective relief, that makes no sense in the context of infringements that occurred more than three years prior to the filing of the complaint. Any plaintiff who seeks prospective relief must necessarily show ongoing or future harm and, therefore, could not rely on the discovery rule. The plaintiff would need to seek prospective relief based on new acts of infringement that give rise to new claims. MGM provides no cogent explanation of what practical application the discovery rule would continue to have under its proposed regime and provides no rationale for displacing the important public policy considerations underlying the discovery rule. Those considerations include deterring would-be infringers, punishing existing infringers and allowing copyright holders to seek damages when they have been reasonably diligent in protecting their rights. Adopting MGM's proposed rule would not establish a uniform rule across all courts. Instead, it would only further confuse the careful balance Congress struck in the Copyright Act. (*Infra* Section III.)

ARGUMENT

I. MGM's Proffered "Damages Bar" Cannot Be Reconciled with the Plain Language of the Copyright Act.

"The interpretation of a statutory provision must begin with the plain meaning of its language." *United States v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013) (citing *In re Bonner Mall P'ship*, 2 F.3d 899, 908 (9th Cir. 1993)). "The preeminent canon of statutory interpretation requires [courts] to 'presume that the legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Courts will not "add an extra clause to the text of" an otherwise clear statute. *Nichols v. United States*, 578 U.S. 104, 136 S. Ct. 1113, 1118 (2016). Here, the statutory language is clear.

A. It Is Undisputed that a Claim "Accrue[s]" when a Copyright Holder Knows or Is Chargeable with Knowledge of Infringement.

"No civil action shall be maintained under the provisions of [the Copyright Act] unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). There is no dispute that a claim "accrue[s]" when a copyright holder discovers or reasonably should have discovered the infringement. (Appellant's Br. 3 ("*Sohm* explained that the discovery rule continues to apply to determine when a claim accrues, which MGM does not challenge.").) Thus, Section 507(b) establishes two relevant dates—the date on which a claim

"accrued" (*i.e.*, when a plaintiff knew or should have known about the infringement) and the one on which the action "commenced"—and instructs courts to measure the duration of time between them. If the duration is less than three years, the action is timely.

That rule is undisputed and well-settled. In interpreting Section 507(b), courts have tended to focus on two distinct questions: (i) how to analyze cases in which there is an ongoing series of related infringements and (ii) whether a claim accrues when the infringement occurs or whether it accrues when the infringement is (or reasonably should be) discovered. *See* 3 *Nimmer on Copyright* § 12.05 (2021).

In *Roley*, the Ninth Circuit addressed both. 19 F.3d at 481. In *Roley*, a copyright holder alleged that a film he first viewed three-and-a-half years earlier infringed the copyright on a screenplay he had written. *Id.* He argued for a "rolling statute of limitations theory" in which "the plaintiff may reach back and sue for damages or other relief for all allegedly infringing acts" "so long as any allegedly infringing conduct occurs within the three years preceding the filing of the action". *Id.*

This Court rejected that theory, explaining—in language later echoed by the Supreme Court in *Petrella*—that "the prevailing view [is] that the statute bars recovery on any claim for damages that *accrued* more than three years before

commencement of suit". *Id.* (emphasis added). This Court explained that "[a] cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge", and noted "[t]here is no dispute that Roley's infringement claims accrued" in August 1987, "after first viewing the screening of" the allegedly infringing work. *Id.*

Roley thus answered the first question above (how to analyze cases involving an ongoing series of related infringements) by adopting a separate accrual rule, in which each infringing act gives rise to a separate claim that accrues independently under Section 507(b). *See id.* And it answered the second question (when a claim is understood to have accrued) by adopting the discovery rule, in which a claim accrues when one either knows or reasonably should know of a violation. *See id.*

A decade after *Roley*, this Court reaffirmed those principles. In *Polar Bear*, the plaintiff discovered the infringement on August 9, 1997, and sued on August 3, 2000. 384 F.3d at 707. The defendant—in language now echoed by MGM—argued that "§ 507(b) prohibits copyright plaintiffs from obtaining any damages resulting from infringement occurring more than three years before filing the copyright action, regardless of the date the plaintiff discovered the infringement". *Id.* at 706.

This Court squarely rejected that argument, explaining:

> "*Roley* interpreted the term 'accrue', as it is used in § 507(b), to be the moment when the copyright holder 'has knowledge of a violation or is chargeable with such knowledge.' Synthesizing this definition of 'accrue' with the language of § 507(b), the three-year clock begins upon discovery of the infringement."

Id. (quoting *Roley*, 19 F.3d at 481). Because the plaintiff had discovered the infringement within three years of bringing suit, the plaintiff's claim—including the plaintiff's request for damages—was timely. *Id.* at 707.

This is consistent with the conclusion of the vast majority of lower courts that have considered the meaning of the term "accrue[]" in Section 507(b). *See, e.g.*, *Petrella*, 572 U.S. at 670 n.4 ("The overwhelming majority of courts use discovery accrual in copyright cases." (quoting 6 *Patry on Copyright* § 20:19 (2013))); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009). The Supreme Court had not defined the word "accrue" before *Petrella*. *See Petrella*, 572 U.S. at 670 n.4 ("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 . . . .'"). And it did not take up that issue in *Petrella*. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. --, 137 S. Ct. 954, 962 (2017) ("[I]n *Petrella*, we specifically noted that 'we have not passed on the question' whether the Copyright Act's statute of limitations is governed by such a rule.").

Critically, however, ***MGM agrees*** that a claim does not "accrue" within the meaning of Section 507(b) until the copyright holder actually or constructively discovers the act of infringement giving rise to that particular claim. (Appellant's Br. 3 ("*Sohm* explained that the discovery rule continues to apply to determine when a claim accrues, *which MGM does not challenge*" (emphasis added)); *id.* at 25 ("[A]lthough the discovery rule might prevent a claim from being time-barred altogether, the discovery rule has no bearing on the separate limitation on the retrospective damages available on that claim.").)

Because there is no dispute that the accrual of a claim is determined by when the infringing act giving rise to that claim was discovered, the plain language of the statute calls for a straightforward analysis: if a plaintiff has "commenced" its copyright claim "within three years after the claim" was or reasonably should have been discovered, the claim is timely. Here, it is undisputed that Starz commenced this lawsuit well within three years of discovering the infringing acts. Therefore, the statute of limitations does not bar its claims.

B. The Copyright Act Does Not Include a "Separate Limitation on Retrospective Damages".

Notwithstanding this straightforward analysis, MGM argues that Section 507(b) should be interpreted to lay down two separate rules. According to MGM, "the discovery rule extends the statute of limitations for the *filing of suit*", but there exists a separate "bar on damages", which "limits retrospective relief to

three years from when the complaint is filed". (Appellant's Br. 27.) MGM asserts that this "limit on retrospective damages looks backward from the date the claim is filed; it does not run forward from the point of accrual". (*Id.* at 25.) According to MGM, the issue of accrual is "'disassociated' [*sic*] . . . from the issue of the extent of relief available". (*Id.* at 24 (quoting *Sohm*, 959 F.3d at 52).) This interpretation cannot be reconciled with the text of the statute.

MGM does not (and cannot) point to any language in the statute establishing a distinction between claim accrual and the availability of damages. On its face, Section 507(b) does not contemplate a separate limitation period for retrospective damages. To the contrary, the statute provides that "*[n]o civil action* shall be maintained *under the provisions of this title* unless it is commenced within three years after the claim accrued". 17 U.S.C. § 507(b) (emphases added). Thus, the plain language of the statute provides that the timeliness of *all* civil actions maintained under the Copyright Act is measured with respect to the date of their accrual.

This becomes even clearer when Section 507(b) is read, as it must be, in the context of the overall statutory scheme. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) ("[A] fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a

view to their place in the overall statutory scheme." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

Section 504(b) provides that copyright infringers are liable to the copyright holder for "the *actual* damages suffered by him or her *as a result of the infringement*, and *any* profits of the infringer that are *attributable to the infringement* and are not taken into account in computing the actual damages". 17 U.S.C. § 504(b) (emphases added). In the classic discovery rule case, "the infringement" (and the damages caused by the infringement) occurs before the three-year statutory period; the claim resulting from the infringement merely ***accrues*** within the statutory period. MGM's proposed rule thus would prohibit recovery of exactly what Section 504(b) allows—"actual" damages suffered and "any" profits gained "***as a result of the infringement***".

Alternatively, the copyright holder may elect to recover "statutory damages for *all* infringements involved in the action". *Id.* § 504(c) (emphasis added). MGM does not contest that under the discovery rule, copyright plaintiffs are permitted to maintain an action for copyright infringements that occurred more than three years before suit if the plaintiff discovered the infringements within the three-year statutory period. But MGM asserts that the copyright holder nevertheless cannot seek damages for those claims. This would have the effect of

nullifying Section 504(c)'s clear instruction that a plaintiff may seek damages for "all infringements involved in the action". *Id.*

Had Congress intended for the limitations periods governing such remedies to be measured differently than the general rule set forth in Section 507(b), it would have said so. *See BedRoc Ltd.*, 541 U.S. at 183 ("The preeminent canon of statutory interpretation requires [courts] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." (internal quotation omitted)). But nothing in the Copyright Act's damages provisions provides, or even suggests, that the availability of these remedies is to be calculated differently from the formula plainly set forth in Section 507(b). If a plaintiff's claims are timely under Section 507(b), then the plain language of Sections 504(b) and (c) allows the plaintiff to recover damages for ***all*** those timely infringements, not just those occurring in the three years preceding suit. *See Nichols*, 578 U.S. 104, 136 S. Ct. at 1118 (explaining that courts will not "add an extra clause to the test of" an otherwise clear statute); *Flores*, 729 F.3d at 914 (explaining that statutory interpretation begins with the plain meaning of the statutory language); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) (declining to limit application of statute to a subset of circumstances where there was no basis in the text of the statute to do so).

MGM's related argument that the statute mandates a three-year backward-looking time calculation for damages claims is inconsistent with the statutory text and irrelevant in any event. (*See* Appellant's Br. 25-26.) Section 507(b) instructs the court to measure the timeliness of a cause of action based on the length of time "after the claim accrued"—not the length of time before filing suit. 17 U.S.C. § 507(b). This is directly contrary to MGM's assertion that Section 507(b) provides a clock that "run[s] backward". (*See* Appellant's Br. 25-26 (quoting *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 760 (S.D. Ohio 2021)).)

That distinction, however, is ultimately irrelevant. What matters is not the *direction* in which the three-year duration should be counted, but the applicable start and end dates for such counting. Section 507(b) makes clear that timeliness under the Copyright Act is based exclusively on the duration between the dates of accrual and the commencement of suit. 17 U.S.C. § 507(b). Three years is the same regardless of whether one measures it forward or backward.

For this reason, the cases on which MGM relies do not support its proposed distinction. MGM cites *Navarro* in an effort to establish a distinction between statutes of limitations that employ "a clock that 'runs forward'" and those that "run backward". (Appellant's Br. 25–26 (quoting *Navarro*, 515 F. Supp. 3d at 760).) *Navarro* in turn cites the Supreme Court's decision in *SCA Hygiene* in

support of this notion. *See Navarro*, 515 F. Supp. 3d at 760. But the Supreme Court in *SCA Hygiene* expressly declined to endorse any such distinction, describing it as a "debatable taxonomy". *See* 580 U.S. --, 137 S. Ct. at 962.

MGM's reliance on *Young v. United States*, 535 U.S. 43 (2002), for the proposition that statutory "look-back" periods can bar some, but not all, remedies similarly fails. (Appellant's Br. 25-26 (quoting *Young*, 535 U.S. at 47-48).) *Young* concerned a provision of the *bankruptcy* code governing the priority of claims in the distribution of debtor's assets. 535 U.S. at 46. The Supreme Court ruled that this provision functions as a statutory limitations period, which preserved specific priority and nondischargeability rights in the narrow context of a bankruptcy proceeding. *Id.* at 49. The statute at issue in *Young* bears no resemblance to the one at issue here, which governs *all* "civil action[s] . . . maintained under the provisions of" the Copyright Act, regardless of the remedy sought. 17 U.S.C. § 507(b).

MGM asks this Court to create an entirely new provision—a separate limitations period for damages—that is absent from the unambiguous text of the statute. The Court should decline to create a rule that is not contained in the statute itself. *See Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1265 (9th Cir. 2021) (in interpreting the Copyright Act, "[a]s in all statutory interpretation, 'our

inquiry begins with the statutory text, and ends there as well if the text is unambiguous.'" (quoting *BedRoc Ltd.*, 541 U.S. at 183)).

II. MGM's Argument Misreads *Petrella*.

MGM argues that *Petrella* "'explicitly disassociated' [*sic*] the issue of accrual from the issue of the extent of relief available". (Appellant's Br. 24 (quoting *Sohm*, 959 F.3d at 52).) According to MGM, "[u]nder *Petrella*, . . . the limit on recoverable damages is not determined with reference to when a claim accrues. Instead, the extent of recoverable damages is determined solely by the date the complaint is filed and runs backwards to cut off damages three years from that point." (*Id.* at 23.) That argument fails.

Petrella ruled that a defendant cannot rely on the equitable defense of laches to *shorten* the statutory limitations period, even where the plaintiff was *aware* of sequential infringements and unreasonably delayed filing suit. It had no occasion to pass upon the contrary situation in which a plaintiff, previously *unaware* of an infringement, files suit within three years of discovering it and, thus, within three years of when the claim based on the infringement accrues. The Supreme Court's rejection of the laches defense was based on a straightforward application of the statute. A similar application defeats MGM's appeal here.

A. *Petrella* Applied Section 507(b) as Written.

In *Petrella*, the plaintiff brought claims *only* for infringements that had occurred within the statutory three-year period prior to the filing of the complaint. *Id.* at 675-76. The defendant moved for summary judgment arguing that the plaintiff's claims were barred by laches because she had unreasonably delayed bringing suit in light of her longstanding awareness of MGM's infringing conduct. *Id.* at 675. The district court granted the motion. *Id.*

The Ninth Circuit affirmed, explaining:

> "'Laches is an equitable defense that prevents a plaintiff, who *with full knowledge of the facts*, acquiesces in a transaction and sleeps upon his rights.'" *Danjaq [LLC v. Sony Corp.]*, 263 F.3d [942,] 950-51 [(9th Cir. 2001)] (internal quotation marks omitted). '*[I]f any part of the alleged wrongful conduct occurred outside of the limitations period*, courts presume that the plaintiff's claims are barred by laches.' *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006)."

Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946, 951 (9th Cir. 2012) (emphases added), *rev'd*, 572 U.S. 663 (2014). As is clear from the above-quoted language, the Ninth Circuit's laches doctrine applied *only* to those plaintiffs "with full knowledge of the facts"—a population that necessarily excluded a plaintiff availing itself of the discovery rule. *Id.* As is also clear, by asking whether "any part of the alleged wrongful conduct occurred outside of the limitations period", the Ninth Circuit's laches doctrine was in significant tension with its own earlier

adoption of a separate accrual rule. *See Roley*, 19 F.3d at 481 ("In 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.").

The Supreme Court reversed, emphasizing the application of the "separate-accrual" rule under Section 507(b). *See Petrella*, 572 U.S. at 671 ("Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs. In short, each infringing act starts a new limitations period."). The Supreme Court explained that laches was unnecessary because "the copyright statute of limitations, § 507(b), itself takes account of delay". *Id.* at 677. Using language that echoed the Ninth Circuit's reasoning in *Roley*, the Supreme Court explained that "a successful plaintiff can gain retrospective relief only three years back from the time of suit". *Compare id.*, *with Roley*, 19 F.3d at 481 ("[T]he prevailing view [is] that the statute bars recovery on any claim for damages that accrued more than three years before commencement of suit.").

MGM argues that this and other statements in *Petrella*, each of which echo this Court's prior pronouncements in *Roley*, establish a free-standing rule barring damages for any infringement that occurred more than three years prior to the filing of a complaint, irrespective of when the claim accrued. (Appellant's Br. 23-24.) MGM points to the statements that "Congress . . . enacted 'a three-year look-back limitations period for all civil claims'" (*id.* at 18-19 (quoting *Petrella*,

572 U.S. at 670)); that "[n]o recovery may be had for infringement in earlier years" (*id.* at 19-20 (quoting *Petrella*, 572 U.S. at 677)); that "§ 507(b)'s limitations period . . . allows plaintiffs during that lengthy copyright term to gain retrospective relief running only three years back from the date the complaint was filed" (*id.* at 20 (quoting *Petrella*, 572 U.S. at 672)); and that a copyright "plaintiff 'will miss out on damages for periods prior to the three-year look-back'" (*id.* (quoting *Petrella*, 572 U.S. at 687)), among others. MGM asserts that these statements "'explicitly disassociated' [*sic*] the issue of accrual from the issue of the extent of relief available". (*Id.* at 24 (quoting *Sohm*, 959 F.3d at 52).) That argument fails for a variety of reasons.

First, MGM's argument ignores the legal context of *Petrella*. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994) (finding lower court erred by reading a statement in prior Supreme Court decision in isolation); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 n.8 (2010) (finding the defendant misconstrued Supreme Court precedent by relying on language in isolation from the broader context of the opinion). Because the laches defense at issue in *Petrella* is predicated on a plaintiff's prior ***knowledge*** of past infringements, while the discovery rule is predicated on a plaintiff's prior ***ignorance*** of infringement, the two doctrines necessarily are mutually exclusive.

In the laches context at issue in *Petrella*, the plaintiff's pre-existing knowledge of infringement meant that her claims accrued immediately upon the occurrence of each successive infringing act. *See* 572 U.S. at 676. There was no gap between infringement and discovery. *See id.* *Petrella* thus means what Section 507(b) already expressly says: that a plaintiff may seek damages only for claims that had *accrued* within the three-year period preceding suit.

Because each claim in this context accrued immediately upon the act of infringement, *Petrella* concerned a series of accruals over an extended period of time. Rather than identifying each individual accrual and measuring forward by three years, the Supreme Court achieved the same result by "looking back" to see which infringements/accruals had happened within the past three years. This practical application of Section 507(b) in injury rule cases did not in any way alter its meaning. It was simply a shorthand way of measuring the timeliness of a long string of sequentially accruing claims.

While accrual and infringement occurred simultaneously in the context of *Petrella*, in discovery rule cases they do not. In the discovery rule context, claims accrue *after* the date of infringement, when the plaintiff subsequently discovers the infringing conduct. In this context, claims relating to a string of infringing acts do not accrue successively on the date of infringement. Instead, they may accrue all at once on some later date when they are discovered.

As numerous other courts have acknowledged, *Petrella* can only be understood as a straightforward explication of Section 507(b)'s plain language in the laches context—where the plaintiff's knowledge of the infringing conduct was pre-existing. *See, e.g.*, *Grant Heilman Photography, Inc. v. McGraw-Hill Cos., Inc.*, 28 F. Supp. 3d 399, 411 (E.D. Pa. 2014) ("The Court applied the incident of injury rule to determine the date of accrual in addressing the laches question. . . . *Petrella* was a case about laches, and the holding is limited to that issue."); *Energy Intel. Grp., Inc. v. CHS McPherson Refinery, Inc.*, 300 F. Supp. 3d 1356, 1365-66 (D. Kan. 2018) (noting that *Petrella* "applied the incident of injury rule, meaning that the claim accrues when the infringement occurs" but that "[m]any of the district courts who have examined *Petrella* have concluded that the Supreme Court did not intend to abrogate the discovery rule in that case"). MGM attempts to wrench *Petrella*'s statements from their original context and apply them literally in the entirely separate context of the discovery rule—where the plaintiff learns of the infringement (and her claim therefore accrues) only after the fact. This is inappropriate and must be rejected. *See D'Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.*, 516 F. Supp. 3d 121, 134-35 (D.N.H. 2021) (declining to "read in isolation" these same statements, because they needed to be "viewed in context").

Second, according to *Petrella*:

> "Congress provided *two* controlling time prescriptions: [1] the copyright term, which endures for decades, and may pass from one generation to another; *and* [2] *§ 507(b)'s limitations period*, which allows plaintiffs during that lengthy term to gain retrospective relief running only three years back from the date the complaint was filed."

572 U.S. at 672 (emphases added). The Supreme Court made perfectly clear that aside from the copyright term, the *only* relevant time period under the Copyright Act is the one set forth by Section 507(b) itself—a time period that is expressly measured with reference to the accrual and commencement dates, nothing else. The Supreme Court makes no reference to a *third* controlling time prescription setting forth a "separate limitation on retrospective damages". (*See* Appellant's Br. 25.)

Third, the *Petrella* Court explicitly stated that it did not intend for its ruling to displace the discovery rule: "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.'" 572 U.S. at 670 n.4 (emphasis added) (quoting *William A. Graham Co.*, 568 F.3d at 433). The Supreme Court acknowledged that "[t]he overwhelming majority of courts use discovery accrual in copyright cases".

Id. (quoting *Patry on Copyright* § 20:19). The Supreme Court has since reiterated that "[i]n *Petrella*, we specifically noted that 'we have not passed on the question' whether the Copyright Act's statute of limitations is governed by such a rule". *SCA Hygiene*, 580 U.S. --, 137 S. Ct. at 962. It would therefore be nonsensical for the Supreme Court to have declined to consider the discovery rule in *Petrella*, while also gutting it. Since *Petrella*, courts within the Ninth Circuit have repeatedly and correctly recognized that the discovery rule remains good law. *See, e.g.*, *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10–CV–00106–LRH–PAL, 2015 WL 5089779, at *6 (D. Nev. Aug. 27, 2015) ("[T]he Supreme Court in *Petrella* expressly declined to reject the discovery rule. As such, the discovery rule is still controlling precedent in this action and the court shall deny defendants' motion as to this issue.").

Fourth, *Petrella* expressly preserves equitable tolling doctrines, an aspect of its opinion that would make no sense had it adopted an absolute bar on damages for infringement that occurred more than three years prior to suit. Equitable tolling "lengthens the time for commencing a civil action in appropriate circumstances", including "a party's infancy or mental disability, absence of the defendant from the jurisdiction, [or] fraudulent concealment". *Petrella*, 572 U.S. at 682 n.17; *see id.* at 681. The *Petrella* dissent criticizes the majority opinion as "read[ing] Section 507(b)'s silence as preserving doctrines that lengthen the period

for suit when equitable considerations favor the plaintiff (*e.g.*, equitable tolling), but as foreclosing a doctrine that would shorten the period when equity favors the defendant". *Id.* at 695 (Breyer, J., dissenting). The majority did not dispute that its ruling had precisely this effect, which it justified by explaining that "[t]olling . . . applies when there is a statute of limitations; it is, in effect, a rule of interpretation tied to that limit". *Id.* at 681. By contrast, laches "originally served as a guide when no statute of limitations controlled the claim; it can scarcely be described as a rule for interpreting a statutory prescription". *Id.* at 681-82.

None of this would make any sense if, as MGM asserts, *Petrella* makes an "unequivocal pronouncement . . . that the Copyright Act bars recovery of *any* damages outside of the three-year window preceding the filing of suit". (Appellant's Br. 2-3 (emphasis added).) *Petrella* cannot logically preserve an equitable tolling doctrine that "lengthens the time for commencing a civil action in appropriate circumstances", 572 U.S. at 681, while simultaneously foreclosing a copyright holder's ability to rely on equitable tolling to recover damages.

MGM argues that the district court's ruling disrupts a careful balance the Supreme Court struck in *Petrella*—on the one hand expanding copyright holders' ability to bring claims by invalidating laches while on the other hand protecting defendants from being subjected to claims many years after the infringement occurred. (Appellant's Br. 16.) That is not what the Supreme Court

did. "In construing a statute, the court's objective is to ascertain the intent of Congress in enacting it and give effect to the legislative will." *United States v. Stephens*, 424 F.3d 876, 882 (9th Cir. 2005). The Supreme Court did not engage in any independent balancing of policy—it merely enforced a policy laid down by Congress by allowing plaintiff the full three years after accrual to bring her claim. The Supreme Court did not need to counterbalance enforcement of Congress's statutory scheme with a new policy-based rule of its own creation.

B. Ninth Circuit Precedent Is Consistent with *Petrella.*

For a decision of the Supreme Court to overrule this Court's precedent, the Supreme Court's decision "must have undercut the theory or reasoning underlying [the] prior circuit precedent in such a way that the cases are clearly irreconcilable". *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). As this Court has emphasized, the "clearly irreconcilable" requirement is "a high standard." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (internal quotation marks omitted). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal citation and quotation omitted). "In order for [this Court] to ignore existing Ninth Circuit precedent . . . the reasoning and principles of [the later authority] would need to be

so fundamentally inconsistent with our prior cases that our prior cases cannot stand." *In re Gilman*, 887 F.3d 956, 962 (9th Cir. 2018). "[I]f [this Court] can apply [Ninth Circuit] precedent consistently with that higher authority, [this Court] must do so." *Fed. Trade Comm'n v. Consumer Defense*, 926 F.3d 1208, 1213 (9th Cir. 2019).

Prior to *Petrella*, Ninth Circuit law provided that:

1. each act of infringement gives rise to a distinct claim under the Copyright Act that accrues separately, *see Roley*, 19 F.3d at 481;

2. "accru[al]" of the claim within the meaning of the statute occurs when a copyright holder knows or reasonably should know of an act of infringement, *id.*; *see also Polar Bear Prods.*, 384 F.3d at 706;

3. following accrual of a claim, the copyright holder has three years to commence suit, *see* 17 U.S.C. § 507(b);

4. however, this period could be shortened if a copyright holder "with full knowledge of the facts" based on prior infringements unreasonably delays bringing suit, *see Petrella*, 695 F.3d at 951.

Petrella rejected the fourth element of this analysis on the ground that it was inconsistent with Congress's statutory scheme. In reaching that conclusion, however, nothing in *Petrella*'s logic required it to overturn any of the first three elements. In fact, the *Petrella* Court expressly invoked *Roley*'s separate accrual rule as a primary basis for rejecting laches as an available defense. As a result, *Roley* and *Polar Bear* remain good law.

Most courts across the country agree that *Petrella* does not overrule Circuit-level law adopting the discovery rule. *See, e.g.*, *Grant Heilman Photography*, 28 F. Supp. 3d at 411 ("This Court does not find that *Petrella* overruled the Third Circuit discovery rule."); *Design Basics, LLC v. Forrester Wehrle Homes, Inc.*, 305 F. Supp. 3d 788, 793 (N.D. Ohio 2018) ("I, too, reject the argument that *Petrella* overruled the Sixth Circuit's rule that copyright-infringement claims accrue under the discovery rule.").

MGM nevertheless asserts that *Petrella*'s "explication of how Section 507(b) operates to account for delay was necessary to the Supreme Court's conclusion" (Appellant's Br. 33), and that "[t]he feature of Section 507(b) that takes account of delay and is thus essential to *Petrella*'s holding is the three-year damages bar" (*id.* at 34). That is incorrect.

First, a purported "damages bar" is not how the Copyright Act "accounts for delay" under *Petrella*'s reasoning. Rather, as explained by the Court in *Petrella*, delay is accounted for by the separate accrual rule. 572 U.S. at 677-78. Each act of infringement gives rise to a separate claim—that rises and falls on its own merits—such that if a copyright holder gains constructive or actual knowledge of an infringement (thereby causing a claim for that infringement to accrue) it must sue within three years or lose that claim altogether. *Id.* at 672. The Copyright Act prohibits improper delay by rejecting the "continuing wrong" theory, which would

treat all acts of infringement as part of one single claim that is timely so long as any infringing acts continue up to three years before suit. Stated differently, MGM is wrong when it asserts that "*Petrella* established that copyright holders *can take as long as they want* to commence suit without being subject to laches, but recovery must be strictly limited." (Appellant's Br. 27 (emphasis added).) A copyright holder cannot take as long as it wants to commence suit. A copyright holder has only three years from the date a specific claim ***accrues*** to sue on that claim, or the copyright holder will lose ***that claim*** in its entirety forever.

Second, *Petrella* is not "clearly irreconcilable" with *Polar Bear*. There is not even meaningful tension. The two cases are easily reconcilable simply by acknowledging that the "three-year look-back" referenced in *Petrella* is a shorthand for Section 507(b)'s statutory limitations period in the specific context of cases where infringement and accrual happen simultaneously—not any new and separate "damages bar". *Roley*, which predated *Polar Bear*, said the same thing and this Court decided *Polar Bear* in light of *Roley*. *See Roley*, 19 F.3d at 481 ("[T]he statute bars recovery on any claim for damages that accrued more than three years before commencement of suit.").

Notwithstanding MGM's assertion that the district court merely felt "bound" by *Polar Bear* (Appellant's Br. 11), the district court in fact reasoned that it "need not force" "such 'doctrinal tension' when the Ninth Circuit provides—

indeed, requires—a more harmonious solution". (1-ER-10–11.) The district court applied *Petrella* consistently with *Polar Bear* by recognizing that *Petrella* was merely applying the separate accrual rule in a context where each successive act of infringement immediately gave rise to an accrued claim.

Third, while MGM argues that the lower courts in *Petrella* erred by disregarding the "damages bar" as the proper mechanism for addressing delay (Appellant's Br. 36-37), that cannot be the case because the plaintiff in *Petrella* did not seek any damages that would have been precluded by the purported "damages bar". The plaintiff in *Petrella* brought claims only for infringements that occurred within the three-year statutory period. 572 U.S. at 667. There could be no error in failing to apply any alleged damages bar.

Again, the Supreme Court held that it was the separate accrual rule—not any alleged damages bar—that was the aspect of the statute that accounts for delay and renders laches unnecessary. *See id.* at 682-83 (holding that "Section 507(b)'s three-year limitations period, however, coupled to the separate-accrual rule" avoids forcing copyright holders "to mount a federal case fast to stop seemingly innocuous infringements"). Indeed, when the Supreme Court states that the statute "itself takes account of delay", the Supreme Court cites back to its discussion of the separate accrual rule. *Id.* at 677.

Fourth, MGM argues that *Petrella* cannot be limited to cases involving the injury rule because the Supreme Court invalidated laches in all cases, not just those applying the injury rule. (Appellant's Br. 35.) But laches and the discovery rule are inherently mutually exclusive; laches could never be invoked in discovery rule cases in the first place. *See Danjaq LLC*, 263 F.3d at 950-51 ("Laches is an equitable defense that prevents a plaintiff, who 'with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.'" (quoting *S. Pac. Co. v. Bogert*, 250 U.S. 483, 500 (1919))). For a plaintiff with full knowledge of the facts, the claim will accrue at the time of the infringement itself—not upon any future discovery. By contrast, the discovery rule is only available in the opposite circumstance, where a plaintiff was previously unaware of the alleged wrong. *See Polar Bear*, 384 F.3d at 706. Thus, in eliminating laches as a defense, the Supreme Court made no change whatsoever to discovery rule jurisprudence.

C. A Majority of the Courts Outside the Second Circuit that Have Considered the Issue Have Rejected the Second Circuit's Reading of *Petrella*.

MGM urges this Court to adopt the Second Circuit's conclusion articulated in *Sohm*, that "*Petrella*'s plain language explicitly dissociated the Copyright Act's statute of limitations from its time limit on damages". 959 F.3d at 52. This Court should decline that invitation.

The appellant in *Sohm* made two separate arguments. *First*, the appellant "urge[d] [the Second Circuit] to adopt the 'injury rule'", arguing that *Petrella* had "cast serious doubt on the viability of the discovery rule". *Sohm*, 959 F.3d at 49-50. *Second*, the appellant argued, as MGM here argues, that "even if the district court was correct to apply the discovery rule", the Copyright Act imposed a strict three-year limit on damages in light of *Petrella*. *Id.* at 51.

In *Sohm*, the Second Circuit correctly held that *Petrella* did not overrule the discovery rule, given the Court's explicit observation that "it was not passing on the question of the discovery rule". *See id.* at 50. Nevertheless, the Second Circuit seized on language that uses "infringement" as interchangeable with "accrual" (because on *Petrella*'s specific facts they ***were*** interchangeable) to hold that, independent of the discovery rule, the Supreme Court's decision in *Petrella* established a strict three-year time limit on a copyright plaintiff's recovery, irrespective of when the plaintiff discovered the infringement. *Id.* at 52.

Because the appellant had presented the applicability of the discovery rule and the purported damages bar as two separate issues, the Second Circuit analyzed them in isolation, and failed to appreciate that its conclusion as to the first question was dispositive of the second. In reaffirming the applicability of the discovery rule, *id.* at 50 (noting "the continuing propriety of the discovery rule in this Circuit"), the Second Circuit should have recognized that it necessarily also

resolved the appellant's second argument—that the district court "erred in allowing [the plaintiff] to recover damages for more than three years prior to when he filed his copyright infringement suit", *id.* at 51. The central feature of the discovery rule—as opposed to the injury rule—is that the discovery rule permits a plaintiff to recover damages for infringements that occurred more than three years prior to the commencement of suit. A rule that restricts a plaintiff's ability to recover damages to those infringements that occurred *within* the three-year period is indistinguishable from the injury rule. Thus, in *Sohm*, the Second Circuit erred by first rejecting the injury rule and then embracing a "damages bar" that is its functional equivalent.

The Second Circuit compounded this error by failing to recognize that *Petrella* concerned a laches defense that only applied when the plaintiff's knowledge of infringement was pre-existing—a fact pattern that cannot exist in discovery rule cases. Therefore, after reaffirming the applicability of the discovery rule, the Second Circuit gave a literal application to statements in *Petrella* that only make sense in a context that cannot exist in discovery rule cases—a context where accrual occurs at the time of infringement itself.

Numerous courts have rejected the misreading of *Petrella* adopted by the Second Circuit. For example, in *Menzel v. Scholastic Incorporated*, the district court found that the defendant (who was also the defendant in *Sohm*) erroneously

"isolate[d] language used in *Petrella* from the broader context of the case" in support of its argument that *Petrella* establishes an independent damages bar. No. 17-cv-05499-EMC, 2019 WL 6896145, at *6 (N.D. Cal. Dec. 18, 2019). As numerous courts have noted, "the discovery rule and the ability to recover damages consistent with that rule was not at issue", *see, e.g.*, *id.*, and therefore, "*Petrella* simply recognized that under the injury rule, a party may recover damages for, at most, the three years prior to bringing a claim because a claim accrues upon the relevant infringement and must be brought within three years therefrom", *PK Music Performance, Inc. v. Timberlake*, No. 16-CV-1215 (VSB), 2018 WL 4759737, at *9 (S.D.N.Y. Sept. 30, 2018); *see also Frerck v. John Wiley & Sons, Inc.*, No. 11-cv-2727, 2014 WL 3512991, at *6 n.5 (N.D. Ill. July 14, 2014) (explaining that the Supreme Court applied the injury rule in *Petrella* and expressly noted in a footnote that the standard it was applying was in contrast to the discovery rule, which is the standard in nearly every circuit).

Since *Sohm* was decided, district courts in this Circuit as well as the First and Fifth Circuits have expressly rejected *Sohm*'s interpretation of *Petrella*. *See Mavrix Photo, Inc. v. Rant Media Network, LLC*, No. CV 19-7270-DMG-AFMx, 2020 WL 8028098, at *4 (C.D. Cal. Nov. 2, 2020) ("Post-*Petrella*, courts in the Ninth Circuit have continued to use the discovery rule to allow plaintiffs to seek damages arising from acts occurring outside of the three-year look-back

period."); *D'Pergo Custom Guitars, Inc.*, 516 F. Supp. 3d at 135 ("Most district courts to have considered the issue have held that the limitations on damages discussed in *Petrella* do not apply to claims that are timely pursuant to the discovery rule."); *Stross v. Hearst Commc'ns, Inc.*, No. SA-18-CV-01039-JKP, 2020 WL 5250579, at *8 (W.D. Tex. Sept. 3, 2020) (holding *Petrella* and *Rotkiske v. Klemm*, 589 U.S. --, 140 S. Ct. 355 (2019), did not alter long-established Fifth Circuit precedent applying the discovery rule in copyright cases).

In total, before and after *Sohm*, nearly 30 courts across the Third, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Circuits have declined (either explicitly or implicitly) to interpret *Petrella* as imposing an absolute bar on damages for infringements preceding the three-year limitations period. *See, e.g.*, *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019); *Menzel*, 2019 WL 6896145, at *6; *Adobe Sys. Inc. v. NA Tech Direct Inc.*, No. 17-cv-05226-YGR, 2019 WL 5579472, at *8 (N.D. Cal. Oct. 29, 2019); *Krasemann v. Scholastic Inc.*, No. CV-18-08313-PCT-DWL, 2019 WL 3220535, at *7 (D. Ariz. July 17, 2019); *Evox Prods. LLC v. Chrome Data Sols., LP*, No. 3:16-cv-0057-PK, 2018 WL 6059530, at *16 (D. Or. Sept. 6, 2018); *Kelly v. Maricopa Cty. Sheriff's Office*, No. CV-15-02572-PHX-GMS, 2017 WL 6054675, at *2 (D. Ariz. Dec. 7, 2017); *Phoenix Techs. Ltd. v. VMware, Inc.*, No. 15-cv-01414-HSG, 2017 WL 1289863, at *7 (N.D. Cal. Jan. 6, 2017); *Yue v. MSC Software Corp.*, No. 15-cv-

05526-PJH, 2016 WL 3913001, at *1 (N.D. Cal. July 20, 2016); *Wolf v. Travolta*, 167 F. Supp. 3d 1077, 1092-93 (C.D. Cal. 2016); *UMG Recordings, Inc. v. Global Eagle Entm't, Inc.*, No. CV 14-3466 MMM (JPRx), 2015 WL 12752881, at *8 (C.D. Cal. Aug. 27, 2015); *Oracle USA, Inc.*, 2015 WL 5089779, at *6; *see also Richardson v. Kharbouch*, No. 19-C-02321, 2020 WL 1445629, at *6-7 (N.D. Ill. Mar. 25, 2020); *Design Basics*, 305 F. Supp. 3d at 792-94 (N.D. Ohio 2018); *Energy Intel. Grp.*, 300 F. Supp. 3d at 1371; *Krist v. Scholastic, Inc.*, 253 F. Supp. 3d 804, 811-12, 812 n.44 (E.D. Pa. 2017); *Mitchell v. Capitol Records*, 287 F. Supp. 3d 673, 678 (W.D. Ky. 2017); *Design Basics, LLC v. McNaughton Co.*, No. 3:17-cv-258, 2017 WL 11068761, at *4-5 (M.D. Pa. Nov. 15, 2017); *Boehm v. Svehla*, No. 15-cv-379-jdp, 2017 WL 4326308, at *8-9 (W.D. Wis. Sept. 27, 2017); *Topline Sols., Inc. v. Sandler Sys., Inc.*, No. ELH-09-3102, 2017 WL 1862445, at *21 (D. Md. May 8, 2017); *Alfa Laval Inc. v. Flowtrend, Inc.*, No. H-14-2597, 2016 WL 2625068, at *5-6 (S.D. Tex. May 9, 2016); *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, LP*, No. H-14-1903, 2016 WL 1203763, at *4 (S.D. Tex. Mar. 22, 2016); *Raucci v. Candy & Toy Factory*, 145 F. Supp. 3d 440, 448 (E.D. Pa. 2015); *Design Basics LLC v. J & V Roberts Invs., Inc.*, 130 F. Supp. 3d 1266, 1281-82 (E.D. Wis. 2015); *Design Basics LLC v. Campbellsport Bldg. Supply Inc.*, 99 F. Supp. 3d 899, 919 (E.D. Wis. 2015); *Grant Heilman Photography, Inc.*, 28 F. Supp. 3d at 410-11; *Frerck v. Pearson Education, Inc.*, 63

F. Supp. 3d 882, 887 n.3 (N.D. Ill. 2014); *Beasley v. John Wiley & Sons, Inc.*, 56 F. Supp. 3d 937, 945 n.5 (N.D. Ill. 2014); *Panoramic Stock Images, Ltd. v. McGraw-Hill Glob. Educ. Holdings, LLC*, No. 12 C 9881, 2014 WL 6685454, at *3 (N.D. Ill. Nov. 25, 2014); *Frerck*, 2014 WL 3512991, at *6 n.5.

MGM is able to identify only three district courts outside of the Second Circuit that have adopted *Sohm*'s reasoning. (Appellant's Br. 28 (citing *Nealy v. Atl. Recording Corp.*, No. 18-CIV-25474-RAR, 2021 WL 2280025, at *4 (S.D. Fla. June 4, 2021); *Navarro*, 515 F. Supp. 3d at 761; *Werner v. BN Media, LLC*, 477 F. Supp. 3d 452, 456 (E.D. Va. 2020).) None of those cases grappled with the text of Section 507(b) or its inconsistency with a purported damages bar.

Navarro, which MGM highlights, is particularly unconvincing. The court in *Navarro* held that "as an operational matter, *Sohm*'s damages bar in many ways transformed the Copyright Act's discovery rule into an occurrence rule", a position not even MGM is advocating. *Navarro v. Procter & Gamble Co.*, No. 1:17-cv-406, 2021 WL 913103, at *2 (S.D. Ohio Mar. 10, 2021) (clarifying prior position in denial of motion for reconsideration). *Navarro* also relies on the Fifth Circuit's decision in *Energy Intelligence Group, Incorporated v. Kayne Anderson Capital Advisors, LP*, 948 F.3d 261, 271 (5th Cir. 2020), which it interpreted as holding "that *Petrella* 'foreclosed [plaintiffs] from seeking damages for any *acts completed* before, the three-year look-back period". *Navarro*, 515

F. Supp. at 762. However, the Fifth Circuit actually stated that "[t]he statute of limitations, in combination with the 'widely recognized' rule of separate accrual for copyright claims, meant that ***Petrella*** was foreclosed from seeking damages for any acts completed before January 2006". *Energy Intel. Grp.*, 948 F.3d at 271 (emphasis added). The Fifth Circuit did not hold that a strict time limitation generally applied to all plaintiffs—it was making the uncontroversial observation that the plaintiff in *Petrella* was foreclosed from seeking damages more than three years prior to filing her complaint, which she did not even attempt to do. Similarly, *Navarro*'s reliance on *Design Basics, LLC v. Carhart Lumber Company*, No. 8:13CV125, 2016 WL 424974 (D. Neb. Feb. 3, 2016), is misplaced. *See Navarro*, 515 F. Supp. 3d at 761. *Design Basics* discussed *Petrella* in connection with the injury rule, not the discovery rule, before finding that the discovery rule applied and that the plaintiff's claims were not timely under the discovery rule. *See Carhart Lumber*, 2016 WL 424974 at *4 ("I find that the statute of limitations on [plaintiff's] claims . . . expired three years after February 24, 2010, the date of discovery.").

While MGM argues that this Court should follow the Second Circuit in order to eliminate the possibility of forum shopping (Appellant's Br. 28-30), the reality is that the vast majority of courts across multiple Circuits have already rejected the Second Circuit's approach. It is the Second Circuit's outlier ruling in

Sohm that creates the possibility of forum shopping. This Court should not adopt an erroneous interpretation of Section 507(b) merely because the Second Circuit spoke first.

III. MGM's Proposed Rule Would Upset the Public Policy Underlying the Copyright Act and Discovery Rule and Would Not Create Uniformity.

MGM's proposed rule not only misconstrues Supreme Court precedent and contravenes Ninth Circuit precedent, it also conflicts with the public policy rationale underlying the discovery rule by creating perverse incentives that would distort Congress's intent in enacting the Copyright Act.

A. MGM's Proposed Rule Would Eviscerate the Discovery Rule.

MGM's proposed rule would eviscerate the discovery rule. *See Mitchell*, 287 F. Supp. 3d at 678 (stating that such a rule "effectively obliterates the discovery rule"). It would leave plaintiffs without any remedies for infringements that occurred outside of the look-back period but were discovered within it. And it would render the statutory concept of "accrual" entirely superfluous. *See Desire, LLC*, 986 F.3d at 1265 (in interpreting the Copyright Act, "courts should disfavor interpretations of statutes that render [statutory] language superfluous" (quotation omitted)).

Although MGM argues that a plaintiff could still bring a claim for infringement that occurred outside the look-back period for *prospective* injunctive

relief (Appellant's Br. 17), that makes no sense as a practical matter because an injunction requires some future or ongoing harm. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1214 (C.D. Cal. 2007) ("Irreparable harm cannot be established solely on the fact of past infringement."). A plaintiff who needs the discovery rule to establish that a particular claim ***accrued*** within the statutory period, even though the infringing acts occurred outside of the statutory period, would not be able to seek prospective relief ***for that claim*** at all. Rather, the infringing acts that gave rise to the claim saved by the discovery rule will have been over and done with, by the very definition of the discovery rule. On the other hand, a plaintiff capable of showing that the defendant is continuing to infringe, or has otherwise indicated it will resume its wrongful conduct, could rely (and would have to rely) ***on those separate infringements*** (which give rise to separate claims) to obtain prospective relief.

As if to illustrate the point, MGM argues that, here, there *can be* no prospective relief available for the infringements at issue on this appeal:

> "Because the licenses for the titles underlying the 378 claims at issue expired more than three years ago, any retrospective relief is barred under a proper application of *Petrella*. And because it is undisputed that these licenses all expired, no *prospective* relief is available either."

(Appellant's Br. 39.) Under MGM's proposed rule, then, a plaintiff who discovers acts of infringement more than three years after they occurred would be left

without any relief whatsoever for its claims. That, of course, is what MGM hopes to achieve here, so that its admitted copyright infringement will be insulated from any form of liability. (*Id.*) But MGM fails to provide any cogent explanation of what practical purpose the discovery rule would serve under its regime. It was for precisely this reason that the district court observed "just how hollow [MGM's] approach leaves the discovery rule". (1-ER-11; *see also id.* ("attempting to apply both the discovery rule and a strict damages bar leads to a situation with 'no ready application' because the rules are 'inherently in conflict'" (quoting *Nimmer on Copyright* § 12.05[B][2][c])).)

B. MGM's Proposed Rule Would Distort the Public Policy that Underlies the Discovery Rule.

MGM's proposed rule would similarly unravel the public policy considerations that explain why the majority of courts have adopted the discovery rule in the first place. Those public policy considerations include the motivating policy of encouraging copyright holders to be reasonably diligent without unfairly limiting recovery for plaintiffs who were justifiably unaware of infringement. *See Polar Bear*, 384 F.3d at 707.

The Copyright Act's uniform statute of limitations for civil copyright claims preserves a congressionally drawn balance by allowing content owners to recover for infringements but requiring that they file suit within three years from the date the claim accrued. 17 U.S.C. § 507(b). This uniform three-year bar serves

the dual purposes of "render[ing] uniform and certain the time within which copyright claims could be pursued" and "prevent[ing] the forum shopping invited by disparate state limitations periods". *Petrella*, 572 U.S. at 670.

Allowing damages pursuant to the discovery rule does not distort the definiteness and uniformity of the statute of limitations. *See Polar Bear*, 384 F.3d at 706. Instead, the discovery rule tasks courts with considering when the plaintiff discovered, or with due diligence should have discovered, the infringement, thereby increasing the overall fairness of the proceedings while still maintaining a uniform application of the three-year statute of limitations from the date of accrual. *Id.* This is consistent with the tenor of the Copyright Act, which aims to balance the interests of creators (protecting their works for limited times) with the interests of society (promoting the advancement of technology and the arts). U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]").

MGM argues that its proposed bar on damages recovery under the discovery rule is necessary to prevent defendants from being prejudiced by being required to pay damages for decades-old infringements. (Appellant's Br. 4.) But the underlying public policy of "promot[ing] the timely prosecution of grievances and discourag[ing] needless delay", *Polar Bear*, 384 F.3d at 706, is still satisfied

when damages recovery is available under the discovery rule because those who knew of the infringement but chose not to act (*i.e.*, copyright holders who sit on their hands and choose not to prosecute their grievances in a timely manner) are still barred from any recovery. Conversely, the plaintiff who did not know of the infringement—and whose lack of knowledge was reasonable under the circumstances—is not sitting on her rights. Because that plaintiff could not be incentivized to prosecute her claims in a more timely fashion, she is allowed to recover damages under the balance struck by the Copyright Act.

By contrast, under MGM's proposed rule, "a copyright plaintiff who, through no fault of its own, discovers an act of infringement more than three years after the infringement occurred would be out of luck". *Id.* The rule would do nothing to incentivize copyright holders to file their claims sooner. *Id.* at 706-07 ("It makes little sense, then, to bar damages recovery by copyright holders who have no knowledge of the infringement.").

MGM's proposed rule would only encourage infringers to infringe with impunity so long as they hide their infringements for a longer period of time. The Copyright Act was enacted to provide recovery to plaintiffs whose work was exploited and who timely filed suit, placing the risk with the infringers and deterring would-be infringers. *See, e.g.*, *Minx Int'l, Inc. v. M.R.R. Fabric, Inc.*, No. CV 13-5947 PSG (Cwx), 2015 WL 12645752, at *6 (C.D. Cal. Feb. 11, 2015)

("When a remedy goes beyond pure compensation to serve a deterrent purpose, a windfall is created for someone and Congress likely intended the recipient of the windfall to be the copyright owner whose work was exploited."). MGM's proposed rule would shift the risk from the infringer to the rights holder, contradicting the Copyright Act's remedial scheme of deterring copyright infringement by "tak[ing] away incentives for would-be infringers". *Polar Bear*, 384 F.3d at 708; *see, e.g.*, *Kamar Int'l, Inc. v. Russ Berrie & Co., Inc.*, 752 F.2d 1326, 1332 (9th Cir. 1984).

Such a rule also would contradict decades of Ninth Circuit precedent allowing damages recovery for infringements that occurred more than three years before the complaint was filed in discovery rule cases. *See, e.g.*, *Polar Bear*, 384 F.3d at 706. Absent a clearly irreconcilable Supreme Court decision or intervening controlling authority in the Ninth Circuit—of which there is none—the Court must follow controlling circuit precedent. *See, e.g.*, *United States v. Shelby*, 939 F.3d 975, 978 (9th Cir. 2019) (explaining that a three-judge panel "can only decline to apply prior Circuit precedent 'clearly irreconcilable' with a subsequent Supreme Court decision"); *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000) (per curiam) ("[A]bsent a rehearing en banc, we are without authority to overrule [controlling circuit precedent].").

C. MGM's Proposed Rule Will Not Create Uniformity.

MGM also argues that the district court's ruling undermines Section 507(b)'s purposes of creating a uniform statute of limitations and preventing forum shopping. (Appellant's Br. 28-29.) But the vast majority of courts around the country have *rejected* MGM's proposed rule. (*See supra* Section II.C.) Any discord was created from the Second Circuit adopting the rule MGM proposes now.

The Second Circuit's departure from the statutory text of the Copyright Act should not dictate this Court's decision. As this Court has found, "[w]hen there is a 'compelling reason to do so' [this Court] do[es] not hesitate to create a circuit split, even when several circuits have addressed the question and all reached a result contrary to our own." *Woods v. Carey*, 722 F.3d 1177, 1183 n.8 (9th Cir. 2013). Although the possibility of a circuit split in the copyright context may be "troublesome", it does not "override [this Court's] independent duty to determine congressional intent". *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (disagreeing with the Sixth Circuit as to the *de minimis* exception and noting "as a practical matter, a deep split among the federal courts *already exists*. Since the Sixth Circuit decided [on the *de minimis* exception], almost every district court not bound by that decision has declined to apply [the Sixth Circuit's] rule"). That the Second Circuit was the first to consider this issue cannot mean the

Ninth Circuit must adopt the Second Circuit's rule to ensure uniformity among the courts. To hold otherwise would leave this Court with "no choice but to blindly follow the rule announced by whichever circuit court decided an issue first, even if we were convinced, as we are here, that our sister circuit erred". *Id.*

CONCLUSION

For the foregoing reasons, the Order of the district court should be affirmed.

Dated: October 27, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word limitation of Ninth Circuit Rule 32-1 because it contains 13,362 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

I hereby certify that this Brief complies with the type size and type face requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface of 14 points in Times New Roman font.

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