No. 22-1078

In The Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC.,
and ARTIST PUBLISHING GROUP, LLC,

Petitioners,

v.

SHERMAN NEALY and MUSIC SPECIALIST, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE AUTHORS GUILD, INC., THE DRAMATISTS LEGAL DEFENSE FUND, THE GRAPHIC ARTISTS GUILD, THE ROMANCE WRITERS OF AMERICA, THE SONGWRITERS GUILD OF AMERICA, INC., AND THE TEXTBOOK & ACADEMIC AUTHORS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

NATHAN E. DENNING
WIGGIN AND DANA LLP
437 Madison Avenue
35th Floor
New York, NY 10022
(212) 551-2600
ndenning@wiggin.com

BENJAMIN H. DIESSEL
Counsel of Record
ARMANDO GHINAGLIA
WIGGIN AND DANA LLP
265 Church Street
One Century Tower
New Haven, CT 06510
(203) 498-4304
bdiessel@wiggin.com

Counsel for Amici Curiae

January 12, 2024

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTERESTS OF *AMICI CURIAE*[1]

The Authors Guild, Inc. (the "Guild") is the nation's oldest and largest professional organization of writers. Since 1912, the Guild has served as the collective voice of American authors, and its membership today comprises more than 14,000 writers, including National Book Award winners, Pulitzer Prize winners, and Nobel laureates. The Guild defends and promotes the rights of all authors to write without interference or threat, and to receive fair compensation for that work. As an organization whose members earn their livelihoods through writing, the Guild has a fundamental interest in ensuring that works of authorship and rights of authors are protected online and in print, and that the hard work and talents of our nation's authors are rewarded so they can keep writing, as guaranteed by the Constitution.

The Dramatists Legal Defense Fund (the "DLDF") was created by The Dramatists Guild of America to advocate for the interests of its more than 8,000 members, including playwrights, composers, lyricists, and librettists writing for the stage.

The Graphic Artists Guild ("GAG") is a 501(c)(6) nonprofit trade association which has advocated on behalf of graphic designers, illustrators, animators,

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution for the preparation and submission of this brief.

cartoonists, comic artists, web designers, and production artists for fifty years.

Founded in 1980, Romance Writers of America® ("RWA") is a nonprofit trade association whose mission is to advance the professional and common business interests of career-focused romance writers through networking and advocacy and by increasing public awareness of the romance genre.

Founded in 1931, the Songwriters Guild of America, Inc. (the "SGA") is the oldest and largest advocacy and administration organization in the nation run exclusively by and for songwriters, composers, and other music creators, as well as their heirs, with approximately 4,500 members. SGA advocates for the principles of consent, credit, fair compensation, transparency, sustainability, and equitable treatment for all songwriters and composers.

The Textbook & Academic Authors Association (the "TAA") is a membership community for authors of textbooks, scholarly journal articles and books. TAA's mission is to provide the support members need to succeed in their writing pursuits through educational resources, events, and networking opportunities. Formed in 1987, TAA has more than 3,000 published or aspiring author members.

Together, *amici* represent the nation's authors, dramatists, graphic artists, songwriters, scholarly authors, and other artists. Each organization works to defend and promote the rights of artists to make and receive fair compensation for their works, and each has

a fundamental interest in ensuring that copyright law develops in a way that best promotes the advancement of the creative arts.

SUMMARY OF THE ARGUMENT

As Respondents have explained, this case is not about which accrual rule—discovery or injury—applies to claims under the Copyright Act. See Resps.' Br. at 21-25. Rather, the Court "limited" its review to the question "[w]hether, *under the discovery accrual rule applied by the circuit courts* and the Copyright Act's statute of limitations for civil actions * * *, a copyright plaintiff can *recover damages* for acts that allegedly occurred more than three years before the filing of a lawsuit." Order (Sept. 29, 2023). In other words, where a plaintiff's copyright claim is timely under the discovery accrual rule, does the three-year statute of limitations nevertheless bar the plaintiff from recovering *damages* for acts that occurred outside the limitations period.

In their brief, Petitioners largely ignore the Court's limitation on the Question Presented and instead argue that the discovery rule should not apply to copyright claims at all. See Pet'rs.' Br. at 15-41. As Respondents have explained, that issue is not properly before the Court and has not divided the circuit courts. See Resps.' Br. at 23-25. The Court can and should, therefore, dismiss the writ of certiorari as improvidently granted.

Should the Court address Petitioners' refashioned question, it should nevertheless affirm. The discovery rule governs the accrual of civil copyright claims for two primary reasons: *First*, the text and structure of the Act demonstrate that Congress intended Section 507(b)'s statute of limitations to be subject to the discovery rule, not the injury rule. See *infra* pages 5-16. *Second*, the discovery rule serves the core purpose of the Copyright Act (and Article I's Copyright Clause) by protecting copyright holders, especially America's artists, authors, songwriters, and composers, from the effects of widespread infringement in the digital era. See *infra* pages 16-29.

Consistent with the Copyright Act's text and structure and this Court's decisions in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 n.4 (2014), the circuit courts unanimously apply the discovery rule to determine when claims accrue under the Copyright Act. See *infra* pages 29-32. Eliminating the discovery rule here would be a disruptive reversal of decades of jurisprudence, would upend the expectations of copyright holders and users alike, and would disincentivize creation of new works. See *infra* page 33.

Thus, should the Court engage Petitioners' attempt to go beyond the Question Presented, it should endorse the unanimous view of the circuit courts and hold that the Copyright Act's statute of limitations is subject to the discovery accrual rule.

ARGUMENT

I. The text and structure of the Copyright Act require a discovery rule.

The text and structure of the Copyright Act demonstrate Congress's intent to adopt a discovery rule in civil copyright cases.

A. Congress's choice of different triggers for Section 507's civil and criminal limitations periods demonstrates its intent for the discovery rule to apply to the accrual of civil claims.

Civil actions under Title 17 must be "commenced within three years after *the claim accrued*." 17 U.S.C. § 507(b) (emphasis added). By contrast, criminal actions under Title 17 must be "commenced within 5 years after the *cause of action arose*." *Id.* § 507(a) (emphasis added).

The language appearing in Section 507(b) was first crafted in 1957. In 1949, the Court had construed the phrase "cause of action accrued" to signal a discovery rule. See *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949). In 1951, the Court had construed the phrase "cause of action arises" to signal an injury rule. See *McMahon v. United States*, 342 U.S. 25, 26-27 (1951). When Congress enacted the Copyright Act's limitations periods in 1957, Congress chose "accrued" for civil actions and "arose" for criminal actions. Congress is presumed to have understood and intended a distinction between the two: Where, as here, "the legislature

uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort * * * they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 322. "In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)).

By employing language this Court had recently associated with a discovery rule in the *civil* statute of limitations while using language the Court had associated with an injury rule in the *criminal* statute of limitations, Congress expressed its intention that the discovery rule apply to civil copyright claims and the injury rule apply to criminal copyright claims. See, *e.g.*, *William A. Graham Co. v. Haughey*, 568 F.3d 425, 434 (3d Cir. 2009), cert. denied, 558 U.S. 991 (2009) ("[S]ix years prior to the amendment to the Copyright Act that added the civil limitations period now codified at 17 U.S.C. § 507(b), the Supreme Court interpreted language similar to § 507(a)'s criminal limitations period in the Admiralty Act ('cause of action arises') to embody the injury rule." (quoting *McMahon*, 342 U.S. at 26-27)).

This difference in word choice was intentional. With respect to crimes, "[t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the *occurrence* of those acts the legislature has decided to punish by criminal sanctions." *Toussie v. United States*, 397 U.S. 112, 114 (1970) (emphasis added). As a result, "arose" in Section 507(a) unmistakably requires courts to apply an injury rule instead of a discovery rule, 17 U.S.C. § 507(a).[2]

By contrast, in the civil context, "a statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued," and a claim typically accrues "when the injury occurred *or was discovered*." *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (internal quotation marks and citation omitted and emphasis added). Civil statutes of limitation are distinguishable from criminal statutes of limitation and, as the Court held in *Waldburger*, from civil statutes of repose, which are instead measured "from the date of the last culpable act or omission of the defendant." 573 U.S. at 8. Thus, the Court in *Urie*, in holding that "accrued" signaled the discovery rule, interpreted that word in accordance with "the congressional purpose" underlying the statute instead of applying a

[2] Notably, Title 18 of the U.S. Code, entitled "Crimes and Criminal Procedure," never uses the term "accrues" in connection with a *criminal* statute of limitations. It has only ever used the term in connection with *civil* statutes of limitations. See 18 U.S.C. § 2255(b) (2018); *id.* § 2335; *id.* § 2712(b)(2).

"mechanical analysis of the 'accrual' of petitioner's injury." *Urie*, 337 U.S. at 169.

This Court must give effect to Congress's decision to employ an injury rule to criminal proceedings and a discovery rule to civil proceedings under Title 17.

B. Other intellectual-property statutes show that Congress knew how to adopt the precise injury rule Petitioners recommend here.

In the years immediately before and after the precursor to Section 507 was enacted, Congress adopted several statutes of limitations applicable to intellectual-property actions that unambiguously employ the rule Petitioners ask the Court to impose here. That Congress chose not to do so in Section 507(b) confirms its intent for a discovery accrual rule to apply.

The statute of limitations in patent actions—effective on January 1, 1953—provides that "no recovery shall be had for any infringement *committed* more than six years prior to the filing of the complaint." 35 U.S.C. § 286 (emphasis added). The statute of limitations for copyright actions against the *government*—enacted in 1960—provides that "no recovery shall be had for any infringement of a copyright covered by this subsection *committed* more than three years prior to the filing of the complaint." 28 U.S.C. § 1498(b)

(emphasis added).[3] And the statute of limitations for claims under the Plant Variety Protection Act, enacted in 1970, provides that "[n]o recovery shall be had for that part of any infringement *committed* more than six years (*or known to the owner more than one year*) prior to the filing of the complaint." 7 U.S.C. § 2566(a) (emphasis added).

Each of these statutes provides that (1) "no recovery shall be had" (2) for "any infringement committed" (3) "more than" a specified number of years "prior to the filing of the complaint or counterclaim for infringement in the action." In other words, they provide for exactly the type of limitation on civil recovery Petitioners erroneously claim Section 507(b) does. Pet'rs.' Br. at 44. The fact that this concept is expressly *omitted* from the Copyright Act, while employed in these contemporary statutes, is highly probative. *Rotkiske v. Klemm*, 589 U.S. ___, 140 S.Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

---

[3] Identical language for Section 1498(b) was proposed in 1955, 1958, and 1959 before it was finally adopted in 1960. See H.R. 6716, 84th Cong., 2d Sess. (1955); H.R. 8419, 85th Cong., 2d Sess. (1958); H.R. 4059, 86th Cong., 1st Sess. (1959).

C. The DMCA and VHDPA demonstrate that the discovery rule is generally applicable and that Petitioners' proposed rule applies only to certain claims under Title 17.

The express injury rule included in the Digital Millennium Copyright Act of 1998 ("DMCA") further shows that Congress understood other civil claims brought pursuant to Title 17 to be governed by the discovery rule.

The DMCA amendment included the Vessel Hull Design Protection Act ("VHDPA") at Chapter 13 of Title 17. Among the VHDPA's additions to Title 17 was a statute of limitations provision specifying that, as to vessel hull designs, "[n]o recovery * * * shall be had for any infringement committed *more than 3 years before the date on which the complaint is filed*." 17 U.S.C. § 1323(c) (emphasis added).[4] This is the exact sort of

---

[4] Congress *could* have allowed Section 507(b)'s default rule to apply to the VHDPA. But Congress instead expressly adopted an injury rule at Section 1323(c). This would have been unnecessary if Congress had understood Section 507(b) to incorporate an injury rule.

The VHDPA is just one of many examples showing that Congress knows how to expressly deploy the sort of injury rule Petitioners implausibly assert was silently included in Section 507(b). For instance, when adopting the Semiconductor Chip Protection Act at Chapter 9 of Title 17 in 1984, Congress rejected nearly identical injury-rule language in favor of standard language regarding accrual. Compare 17 U.S.C. § 911(d) ("An action for infringement under this chapter shall be barred unless the action is commenced within three years after the claim accrues.") with H.R. 2985, 98th Cong., 1st Sess., § 1 (1983) (proposed 17 U.S.C. § 922(c)) ("No recovery * * * shall be had for any infringement

injury rule Petitioners claim is already part of Title 17. But if that were the case, then this language would be superfluous. See, *e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *Yates v. United States*, 574 U.S. 528, 543 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Moreover, at the same time Congress adopted the injury rule under the VHDPA, Congress also amended Section 507(a), relating to the statute of limitations for criminal actions under the Copyright Act. See Pub. L. 105-304, title I, § 102(e), Oct. 28, 1998, 112 Stat. 2863. Congress's decision to leave Section 507(b) unchanged shows that Congress felt no need to revisit the discovery rule generally applicable to civil claims. See *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

---

committed more than three years prior to the filing of the complaint."), quoted in Hearings on H.R. 1028 Before the H. Comm. on the Judiciary, 98th Cong. 481 (Aug. 3 and Dec. 1, 1983) (Serial No. 34). Expressly adopting this accrual language was necessary because Congress made clear elsewhere that Section 507(b), and its accrual standard, does not apply to Chapter 9 of Title 17. See 17 U.S.C. § 912(b).

D. Petitioners' arguments against a discovery rule lack merit.

Petitioners offer a variety of assertions purportedly to support their contention that the phrase "claim accrues" requires the Court to reject the discovery rule here. These assertions lack merit.

First, Petitioners suggest that cases, treatises, and statutes prior to the adoption of the Copyright Act's civil statute of limitations demonstrate that, at that time, "accrued" referred solely to the time of injury. See Pet'rs.' Br. at 17 *et seq*. As an initial matter, the right place to look to understand what "accrues" means in the context of a copyright claim is the text and structure of Title 17, where the Copyright Act is found. The word "accrued" standing alone lacks "any definite technical meaning" and must be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926); see also *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) ("The Court has pointed out * * * the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.' "); *TRW*, 534 U.S. at 28 (examining whether text and structure of statute expressed "Congress's intent to preclude judicial implication of a

discovery rule").[5] Petitioners' reliance on interpretations of *other* statutes ignores this principle.

Moreover, contrary to Petitioners' assertion, a discovery rule aligns with how the concept of "accrual" was understood at the time. In the years around when the civil statute of limitations was added to the Copyright Act, courts understood that accrual could refer to the discovery rule in the face of legislative silence. Courts rejected as "wholly untenable" assertions that construing accrual to incorporate a discovery rule meant "invading the province of the legislature." *Morgan v. Grace Hosp., Inc.*, 149 W.Va. 783, 790 (1965). Where the legislature has not defined "the time of accrual," "[a] determination that the time of accrual is the time of discovery is no more judicial legislation than a determination that it is the time of the commission of the act." *Berry v. Braner*, 245 Or. 307, 313 (1966).[6]

---

[5] Petitioners' reference to Judge Murphy's concurrence in *Everly v. Everly*, 958 F.3d 442, 462 (6th Cir. 2020), Pet'rs.' Br. at 30, for the proposition that "accrues" had a fixed meaning at the time Section 507(b)'s precursor was enacted misses the mark for the same reason.

[6] Petitioners cite cases purportedly to show that "accrues," standing alone, excludes the possibility of a discovery rule. See Pet'rs.' Br. at 17-20. These cases are inapplicable. None of *Rawlings v. Ray*, 312 U.S. 96 (1941), *Franconia Associates v. United States*, 536 U.S. 129 (2002), or *Gabelli v. Sec. & Exch. Comm'n*, 568 U.S. 442 (2013) even involved any dispute between private parties regarding the discovery rule. Other cases involved the word "accrued" in entirely different contexts. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, the Court tied "accrued" under 15 U.S.C. § 15b to the date of injury, consistent with the negative-implication canon, because 15 U.S.C. § 16(b) expressly tolls the

Second, Petitioners argue that the legislative history of Section 507(b) reflects Congress's decision to reject a discovery rule. See Pet'rs.' Br. at 21-23. This is incorrect, for the reasons explained by the Third Circuit in *Graham*: "Congress rejected inclusion of any statutory exceptions to the statute of limitations period," not because it intended to eliminate equitable considerations, but "because 'the Federal district courts, generally, would recognize these equitable defenses anyway.'" 568 F.3d at 436 (quoting H.R. Rep. No. 84-2419, at 2 (1956)). Petitioners also point to an exchange between Representative Shepard J. Crumpacker and a lobbyist to argue that the lobbyist's comment reflects Congress's intent to adopt the injury rule. See Pet'rs.' Br. at 22. But "[t]hat single statement by a witness at

---

statute of limitations. 401 U.S. 321, 335-38 (1971). See *TRW*, 534 U.S. at 28-29 (discussing the negative-implication canon). *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California* is similarly inapplicable. 522 U.S. 192 (1997). There, the Court rejected an "extraordinary reading of 29 U.S.C. § 1451(f) that would trigger the statute of limitations before a cause of action accrues." *Id.* at 205. The Court did not discuss the discovery rule because 29 U.S.C. § 1451(f) already has a built-in discovery rule.

Nor is the Third Circuit's second decision in *William A. Graham Co. v. Haughey* helpful to Petitioners. 646 F.3d 138 (3d Cir. 2011). After the original decision, the defendants claimed that prejudgment interest was available only from the date on which the claim accrued under Section 507(b), *i.e.*, the date of discovery, not the date of injury. At pains to reject these arguments, the panel relied on Delaware and Pennsylvania state law to conclude that prejudgment interest was available as of the date of infringement but that, nevertheless, the discovery rule tolled the running of the limitations period. See also *Brownstein v. Lindsay*, 742 F.3d 55, 70 (3d Cir. 2014).

a congressional hearing, which no congressperson commented on or agreed with, signifies nothing and is hardly a basis to conclude that Congress intended to apply the injury rule." *Graham*, 568 F.3d at 436. Finally, Petitioners state that "[t]he public nature of publication ordinarily provides injured parties with 'reasonably prompt notice' of their rights." Pet'rs.' Br. at 22 (quoting S. Rep. No. 1014, 85th Cong., 1st Sess. 2 (1957)). But this concern with notice reflects "an inquiry consistent with the discovery rule." *Graham*, 568 F.3d at 435.

Third, Petitioners contend that the fact that some statutes expressly provide for a discovery rule while others lack a statutory discovery rule indicates that Congress intended to foreclose application of the discovery rule in statutes that lack an explicit discovery rule. See Pet'rs.' Br. at 20-21. But "[t]he simple fact that Congress, in drafting the statute, did not include express language of discovery is not equivalent to an explicit command that the discovery rule does not apply." *Stephens v. Clash*, 796 F.3d 281, 285 (3d Cir. 2015).[7] In

[7] Petitioners argue that a handful of statutes in effect when Congress enacted the precursor to Section 507(b) show that a discovery rule could have been incorporated explicitly. See Pet'rs.' Br. at 20-21. But none of these statutes reflected even a remotely analogous "discovery rule" at the time. Under Sections 77m, 77www, 78r, and 78i of Title 15 as then in effect, a plaintiff had to file suit within three years of a violation *and* one year of discovery of the facts constituting the violation, such that these statutes included no concept of lengthening the time to bring an action, like the discovery rule does. See *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 516 (2017) (*CalPERS*) (describing 15 U.S.C. § 77m as a statute of repose). 19 U.S.C. § 1621

any event, Section 507 is clear. Congress used the word "arose" for criminal actions, a term that definitively referred to an injury rule, but used the word "accrued" for civil claims, a term that the Court had previously interpreted as referring to the discovery rule. Under these circumstances, this Court—like every circuit court to have considered this language—must respect the distinction Congress drew.

II. The discovery rule is sound policy.

The conclusion that civil claims under the Copyright Act are governed by a discovery rule is consistent with this Court's mandate in *TRW* that a discovery rule applies to statutes that "govern an area of the law that cries out for application of a discovery rule." 534 U.S. at 28. No statute cries out louder for a discovery rule than the Copyright Act.

The discovery rule advances the constitutional and statutory framework that seeks to ensure artists have an incentive to produce creative works for the public good. The discovery rule is especially important in the digital age. Pay for artists has decreased dramatically in recent years. At the same time, wrongdoers can more easily infringe works and do so at scale with high-quality copies, making it harder for artists

---

allows the government to impose civil penalties. Because such statutes are strictly construed against the government, Congress was required to incorporate a discovery rule expressly. Congress did so in 1935. See Aug. 5, 1935, ch. 438, title III, § 306, 49 Stat. 527.

to police infringement. Once an artist does find an infringement, he or she faces great difficulties in obtaining legal relief. Under Petitioners' proposed rule, these difficulties would become insurmountable, to all of our detriment.

A. The discovery rule furthers our nation's fundamental interest in artistic development.

The discovery rule promotes the constitutional imperative of promoting artistic development that lies at the heart of our modern copyright regime. See U.S. Const. art. I, § 8, cl. 8 ("Congress shall have Power * * * [t]o 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 * * * ."). By protecting artists' rights in their works and encouraging private enforcement of infringements that harm artists, the laws ensure that society can benefit from access to valuable cultural works that otherwise may not be produced or shared with the public. See *Eldred v. Aschroft*, 537 U.S. 186, 212 n.18 (2003) ("[C]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge." (citation omitted)); *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic

creativity for the general public good." (internal quotation marks omitted)).

The Court has recognized this framework on several occasions. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court identified the need to "encourage the types of lawsuits that promote" the purposes of "encouraging and rewarding authors' creations while also enabling others to build on that work." 579 U.S. 197, 204 (2016). The Court recognized that copyright law ought to give a litigant who "is clearly correct * * * an incentive to litigate the case all the way to the end." *Id.* at 205. By preserving the ability for artists to sue for infringements they could not reasonably have discovered sooner, the discovery rule helps make this possible. This is more important now than ever.

B. American artists are in crisis while they struggle to police infringers.

Artists face unprecedented and worsening financial pressures. In a 2018 Guild survey of more than 5,000 respondents, published authors reported a 42-percent decline in median earnings from writing-related projects over the past decade. See The Authors Guild, *Six Takeaways from the Authors Guild 2018 Author Income Survey* (last updated Jan. 9, 2019) [hereinafter Income Survey], https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/.[8] Nearly half of

[8] In 2023, the Authors Guild conducted a subsequent author income survey. See The Authors Guild, *Key Takeaways from the*

authors reported their book-related income is falling. See The Authors Guild, *Presentation on U.S. Published Book Author Income Survey* 9 (Jan. 2019) [hereinafter Income Survey Presentation], https://web.archive.org/web/20201026131351/https://authorsguild.org/wp-content/uploads/2019/01/Authors-Guild-U.S.-Published-Author-Income-.pdf. The median annual income of full-time authors is just $20,300. See *id.* at 10; Income Survey.

Authors are earning less and less money from writing. Only a fifth of authors earn all their income from writing books, as book royalties for full-time authors are down to a median of just $12,400 a year. See Income Survey Presentation 7. Authors are also writing less than before, turning instead to speaking engagements, teaching, editing, and other activities to make a living. See Income Survey; Income Survey Presentation 18. Authors have expressed concerns about the viability of their profession:

- "I love writing books but the return on effort is limited * * * . I find myself having to decide if it is even possible to continue * * * ."
- "Right now, being an author feels like an expensive hobby."

Authors Guild's 2023 Author Income Survey (last updated Oct. 25, 2023), https://authorsguild.org/news/key-takeaways-from-2023-author-income-survey/. Although the full report has not yet been published, statistics from the 2023 survey reflect the continuation of negative trends identified in the 2018 survey, along with growing concerns about generative artificial intelligence being trained on authors' work without permission.

- "If my husband wasn't keeping me and my family financially, I would not be able to write. So even though I am published by a Big Five publisher and have a New York agent, I have earned so little, my writing is realistically just a hobby."

Income Survey Presentation 32.

These challenges extend to other creative fields. Photographers, for example, "work extraordinarily long hours and earn * * * on average just $34,000 a year." U.S. House, Comm. on the Judiciary, *The Case for Small Claims in America: Testimony of David P. Trust* (Sept. 27, 2018), https://docs.house.gov/meetings/JU/JU00/20180927/108733/HHRG-115-JU00-Wstate-TrustD-20180927.pdf. They "tend to be small business owners; most are sole proprietors earning $50,000 dollars or less each year." David Nimmer, *Proposal For Small Copyright Infringement Claims* (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/05_american_photographic_artists.pdf. Graphic artists also face unprecedented pressures. By 2021, according to data collected by the Graphic Artists Guild, typical income for illustrators—ranging from $45,500 to $64,250—had had declined considerably since 2003 when accounting for inflation. See The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines 196 (16th ed. 2021).[9] Songwriters and dramatists work under

[9] The 2003 version of the handbook shows income for illustrators ranging from $30,750 to $57,250. See The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines 115 (11th ed. 2003). Had illustrator salaries kept pace with inflation, the 2021

similar financial strain. See U.S. House, Comm. on the Judiciary, *Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades* (Sept. 30, 2020) (statement of Rick Carnes, President, The Songwriters Guild of America), https://www.songwritersguild.com/docs/9-30-20-comments-house-judic-re-section-512-IP-1.pdf (explaining that "the US and global music creator community has been decimated over the past two decades even as music content was utilized as a primary driver * * * in amassing enormous wealth for the multi-national Big Tech industry"); Patrick Healy, *Offering Playwrights a Better Deal*, N.Y. Times (Nov. 4, 2014), https://www.nytimes.com/2014/11/05/theater/offering-playwrights-a-better-deal.html (reporting on a 2009 survey that found "on average, playwrights earned $25,000 to $39,000 annually from their work, with about 62% making less than $40,000").

At the same time, the digital boom has taken a heavy toll on artists. Consumption of pirated digital works siphons off approximately 14% of eBook sales, costing publishers more than $300 million per year. See Imke Reimers, *Can Private Copyright Protection Be Effective? Evidence from Book Publishing*, 59 J.L. & Econ. 411, 414 (2016) (concluding that, if an eBook is not actively protected against piracy, it will lose approximately 14% in sales); Press Release, Digimarc, *E-Book Piracy Costs Publishers $315 Million in Lost*

---

salary range would be approximately $46,000 to $85,000. See U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm.

Sales (Mar. 14, 2017), https://www.prnewswire.com/news-releases/e-book-piracy-costs-publishers-315-million-in-lost-sales-300423534.html. As the Guild informed Congress, "the number of piracy complaints handled by the Authors Guild has skyrocketed." U.S. Sen., Comm. on the Judiciary, Subcomm. on Intell. Prop., *Section 512 Hearing: Is the DMCA's Notice-and-Takedown System Working in the 21st Century?* 4 (June 2, 2020) (statement of Douglas J. Preston, President, The Authors Guild), https://www.judiciary.senate.gov/imo/media/doc/Preston%20Testimony.pdf. From just 2018 to 2019, "the number of piracy and counterfeiting issues reported to the Authors Guild's legal department has increased at least tenfold." The Authors Guild, *In re: The State of Counterfeit and Pirated Goods Trafficking and Recommendations* (July 29, 2019), https://web.archive.org/web/20220614221009/https://www.authorsguild.org/wp-content/uploads/2019/09/Authors-Guild-Comments.DOC-Counterfeiting-1.pdf.

The problem is not unique to written works. According to a survey of visual artists submitted to Congress, more than 60% of respondents had found an infringement of their work, and more than 70% of them reported that the infringement appeared online. See Graphic Artists Guild, *Remedies for Small Copyright Claims: Additional Comments* (Oct. 18, 2012), https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/GAG_NOI2_Remedies_for_Small_Copyright_Claims.pdf.

Policing these infringements is more difficult now than ever before. Infringements are distributed online

at massive scale at virtually no cost by a sea of largely anonymous infringers around the world. See U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* 1 (Sept. 2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf. Artists often compare policing infringement to a game of whack-a-mole. See, *e.g.*, U.S. Sen., Comm. on the Judiciary, Subcomm. on Intell. Prop., *supra*, at 6. An artist might successfully have an infringing copy taken down, only to see it uploaded again the next day. See *id.* Or a court may order a website hosting infringing works to take down content, only to have the site change its domain. See, *e.g.*, Katy Guest, *"I Can Get Any Novel I Want In 30 Seconds": Can Book Piracy Be Stopped?*, The Guardian (Mar. 6, 2019), https://www.theguardian.com/books/2019/mar/06/i-can-get-any-novel-i-want-in-30-seconds-can-book-piracy-be-stopped. Even when an infringer is barred from a platform, the same infringer may show up on the same platform a few days later under another pseudonym. See, *e.g.*, Alison Flood, *Plagiarism, "Book-Stuffing," Clickfarms * * * The Rotten Side of Self-Publishing*, The Guardian (Mar. 28, 2019), https://www.theguardian.com/books/2019/mar/28/plagiarism-book-stuffing-clickfarms-the-rotten-side-of-self-publishing.

"The burden of policing infringements stretches the resources of artists and business owners and their representatives." U.S. House, Comm. on the Judiciary, *supra*. But unfortunately, no matter a party's resources and diligence, infringement in the digital realm is

usually discovered "through chance discovery." See The Authors Guild, *supra*, at 11, 12.

Infringements are also becoming harder to identify. In the past, infringement was characterized by easily detectable quality discrepancies. See David Streitfeld, *What Happens After Amazon's Domination Is Complete? Its Bookstore Offers Clues*, N.Y. Times (June 23, 2019), https://www.nytimes.com/2019/06/23/technology/amazon-domination-bookstore-books.html (documenting printing quality as one hallmark of infringement). But these indicia of infringement are harder to detect or disappearing altogether as print-on-demand ("POD") technology improves. See *id.* ("a keen-eyed customer" spotted a counterfeit only by noticing that it was larger than the original). Exacerbating this trend, POD publishers "are not incentivized to alert authors or publishers that someone is counterfeiting their books, since counterfeiters boost POD revenues." The Authors Guild, *supra*, at 6 n.16. See Streitfeld, *supra* (reporting how one POD publisher "acknowledged that he had not told * * * the copyright owner[] that its rights were violated"). Thus, even obvious infringements can go unreported.

Similarly, graphic artists' digital works can now be pirated with disturbing ease. Businesses offer software designed to remove digital watermarks, allowing users to easily misappropriate and commercialize copyrighted images. See, *e.g.*, InPaint, *How to Remove Watermark from a Photo* (last visited Dec. 28, 2023), https://theinpaint.com/tutorials/online/how-to-remove-watermark-from-photo. Even major U.S. retailers have

been accused of unwittingly selling clothing with pirated images. See, *e.g.*, Compl., *Clinch v. Planet Productions, LLC*, 1:17-cv-4099 (S.D.N.Y. Jun. 1, 2017) (allegations concerning Urban Outfitters and Forever 21). Worse, infringement has become startlingly automated, with "bots" now monitoring social media for comments such as "I'd love to have this on a shirt." Tom Gerken, *How Bots Are Stealing Artwork from Artists on Twitter*, BBC (Dec. 17, 2019), https://www.bbc.com/news/technology-50817561. When an image receives a threshold number of comments, bots issue orders to third-party vendors to print and sell shirts with the image. *Id.* As with written works, the volume and quality of these infringements mean that discovery often occurs by chance. See *id.*

Even when artists find an infringement promptly, they face barriers to enforcement. For example, "a copyright owner seeking to pursue an infringement claim must first identify and locate the allege infringer," but "[i]n the internet age—where wrongdoers can act anonymously—this can be difficult." U.S. Copyright Office, *supra* at 18. In addition, legal mechanisms intended to help copyright holders find infringers are often ineffective. See *Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003) (holding that a subpoena under 17 U.S.C. § 512(h) generally may not be used to compel internet service providers to provide information about subscribers who are infringing on others' works).

Even once an artist knows all the facts and finds the right person to sue, the complexity and cost of

federal civil litigation make enforcement unrealistic in most cases. As the Register of Copyrights explained to Congress a few years ago, "[i]n 2017, the median cost to litigate a copyright infringement suit with less than $1 million at stake was estimated at $200,000." U.S. House, Comm. on the Judiciary, *Statement of Karyn A. Temple, United States Register of Copyrights* (June 26, 2019), https://www.copyright.gov/laws/hearings/testimony-of-karyn-temple-for-june-26-oversight-hearing.pdf. Combined with attorneys' reluctance to take on cases with less than $30,000 at stake, "low-dollar but still valuable copyrighted works often may be infringed with impunity, with individual creators and small businesses often lacking an effective remedy." *Id.*

In the aggregate, these infringements "have an effect on the livelihoods of individual creators akin to the infamous torture 'death by a thousand cuts.'" The Songwriters Guild of America and The Nashville Songwriters Association International, *In the Matter of Remedies for Small Copyright Claims*, https://www.copyright.gov/docs/smallclaims/comments/51_songwriters_guild.pdf.[10]

---

[10] The Copyright Alternative in Small-Claims Enforcement ("CASE") Act mitigates some of these issues, reducing procedural burdens for low-value cases by creating a "small claims" forum for copyright violations and reducing the need for attorneys. See H.R. Rep. No. 116-252 at 20 (Oct. 22, 2019), https://www.congress.gov/116/crpt/hrpt252/CRPT-116hrpt252.pdf. Nevertheless, pursuing claims under the CASE Act comes with important tradeoffs. "Total damages are limited to $30,000 or less," and adjudicators are "flatly prohibited * * * from enhancing statutory damages for

Without a discovery rule, artists would stand no chance.

C. Petitioners' and their *Amici*'s policy arguments to the contrary are unpersuasive.

Petitioners and their *Amici* contend that a discovery rule creates purportedly harmful incentives for copyright holders to delay bringing actions to protect their works from infringement. See, *e.g.*, Chamber of Commerce Br. at 21-22. They also maintain that a discovery rule promotes widespread abuse of the legal system by unscrupulous actors, see, *e.g.*, EFF Br. at 4-13, and that the discovery rule is unfair because the passage of time imposes a greater burden on defendants than on plaintiffs, see *id.* at 15-18; RIAA Br. at 13-16. These assertions are unfounded.

Petitioners and their *Amici* disregard that the discovery rule already is equipped to address individuals who do try to abuse it. "The discovery rule incorporates an objective standard." *Sanchez v. United States*, 740 F.3d 47, 52 (1st Cir. 2014). Under the rule, "a cause of action accrues 'when the plaintiff discovers, *or with due diligence should have discovered*, the injury that

---

willful infringement, which plaintiffs often seek in federal court." *Id.* at 25. In some instances, a CASE Act plaintiff may have a higher burden than in federal court, especially with respect to defaulting defendants. See *id.* at 24-25. And, under 17 U.S.C. § 1506(i), a respondent can choose to opt out of the small-claims process entirely. Thus, the federal courts continue to play a crucial role in protecting artists' rights.

forms the basis for the claim.'" *Graham*, 568 F.3d at 433 (quoting *Disabled in Action of Pennsylvania v. Se. Penn. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008)) (emphasis added). It also requires that a plaintiff be "diligent in discovering the critical facts of the case." *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017). Courts routinely apply this standard to prevent the kind of indefinite liability Petitioners and their *Amici* conjure. See, *e.g.*, *Goldberg v. Cameron*, 482 F.Supp.2d 1136, 1142-43, 1148 (N.D. Cal. 2007) (rejecting plaintiff's argument that "he was unaware of the release of the *Terminator* movies and their potential connection to his works because of his twenty-year spiritual journey" during which he "shunned[] all forms of electronic media").

Notably, neither Petitioners nor their *Amici* cite decisions reflecting rampant abuse of the discovery rule by copyright trolls. In addition, the notion that rightsholders would systematically sit on their claims, as Petitioners' *Amici* say happens, defies common sense. See Chamber of Commerce Br. at 21-22. After all, "a copyright plaintiff bears the burden of proving infringement," *Petrella*, 572 U.S. at 683, and thus "[a]ny hindrance caused by the unavailability of evidence * * * is at least as likely to affect plaintiffs as it is to disadvantage defendants," *id.* at 683-84; accord James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L.J. 589, 600 (1996) ("[P]laintiffs have an incentive to act promptly, since they generally bear the

burden of proof and, therefore, will be more likely to suffer prejudice from the lack of evidence associated with a stale claim than a defendant.").

Finally, Petitioners and their *Amici* assert that an injury rule is necessary as a safeguard against meritless claims. But our legal system already has a series of procedural and substantive safeguards in place to address claims that lack merit (including, for copyright claims, the possibility of attorneys' fees). And Petitioners' injury rule would in any event not effectively weed out only (or even primarily) those claims lacking merit. Rather, it would bar all claims, no matter how meritorious, that do not fall within the injury rule's narrow ambit. It would therefore make little sense to use a statute of limitations—perhaps the most remarkable feature of which is that it bars even meritorious claims—to filter claims based on merit.

III. The circuit courts' unanimous application of the discovery rule is consistent with this Court's prior decisions.

Petitioners sought certiorari ostensibly to resolve "a conflict between the Second and Ninth Circuits on the question whether a plaintiff may recover for acts that occurred more than three years before the commencement of a copyright-infringement action." Pet'rs.' Pet. at 10. But with respect to the issue Petitioners now focus on instead—the discovery accrual rule under Section 507(b)—there is no conflict. Every circuit court to address the issue has reached the same

conclusion—for purposes of Section 507(b), claims accrue in accordance with a discovery rule. See *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) ("We agree with our sister Circuits that the text and structure of the Copyright Act * * * evince Congress's intent to employ the discovery rule, not the injury rule. Policy considerations also counsel in favor of the discovery rule in this context.").[11]

As these courts have recognized—and despite Petitioners' arguments to the contrary, see Pet'rs.' Br. at 6, 29—applying a discovery rule to civil copyright claims accords with this Court's decisions. In *Petrella*, for example, the Court did not abrogate the preexisting consensus that the discovery rule applies to claims under Section 507(b).[12] Even the Second Circuit's decision

---

[11] See also, *e.g.*, *Santa-Rosa v. Combo Records*, 471 F.3d 224, 227 (1st Cir. 2006); *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992); *Graham*, 568 F.3d at 437 (3d Cir.); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997); *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 393 (5th Cir. 2014); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004); *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983); *Comcast of Illinois X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994); *Diversey v. Schmidly*, 738 F.3d 1196, 1201 (10th Cir. 2013); *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020). The D.C. Circuit and the Federal Circuit have not addressed this question.

[12] The Ninth Circuit has identified "nearly thirty cases that have explicitly or implicitly rejected the notion that *Petrella*, a non-discovery rule case, created a damages bar in cases where the discovery rule applies." *Starz Ent., LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236, 1244 n.4 (9th Cir. 2022) (citing, *inter alia*, *D'Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.*, 516 F.Supp.3d 121, 135 (D.N.H. 2021); *Design*

in *Sohm v. Scholastic, Inc.*—on which Petitioners relied when seeking certiorari but now all but ignore—held that "the discovery rule applies for statute of limitations purposes in determining when a copyright infringement claim accrues under the Copyright Act" and expressly "decline[d] to alter th[at] Circuit's precedent mandating use of the discovery rule" after *Petrella*. 959 F.3d 39, 50 (2d Cir. 2020).

Similarly, contrary to Petitioners' argument, see Pet'rs.' Br. at 37, this Court's decision in *TRW* counsels the precise approach that is decisive here: deferring to Congress when Congress specifies a discovery rule based on "implication from the structure and text of the statute." *TRW*, 534 U.S. at 27-28; *Graham*, 568 F.3d at 434 (holding that *TRW* requires courts to defer to Congress when Congress has specified an accrual date by "explicit command" or "by implication from the structure and text of the statute" and otherwise permitting use of the discovery rule); *Thornton v. J Jargon Co.*, 580 F.Supp.2d 1261, 1286 & n.13 (M.D. Fla. 2008)

Basics, LLC v. Forrester Wehrle Homes, Inc., 305 F.Supp.3d 788, 792-94 (N.D. Ohio 2018); *Mitchell v. Capitol Records, LLC*, 287 F.Supp.3d 673, 677-78 (W.D. Ky. 2017); *Krist v. Scholastic, Inc.*, 253 F.Supp.3d 804, 811-12, 812 n.44 (E.D. Pa. 2017); *Wolf v. Travolta*, 167 F.Supp.3d 1077, 1092-93 (C.D. Cal. 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); *Frerck v. Pearson Educ., 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); *Grant Heilman Photography, Inc. v. McGraw-Hill Cos., Inc.*, 28 F.Supp.3d 399, 410-11 (E.D. Pa. 2014)).

(addressing *TRW*'s use of the negative-implication and surplusage canons and holding that "[i]n contrast to the statute of limitations at issue in *TRW*, the statute of limitations in Section 507(b) does not contain an exception or other indication that the general discovery rule would not be applicable"). As other circuit courts have concluded, the text, structure, and purpose of the Copyright Act strongly support a discovery rule in civil cases.[13]

Also without merit is Petitioners' alternative argument that even if there is a discovery rule, it should be strictly limited to cases of "fraud, latent disease, or medical malpractice." Pet'rs.' Br. at 32. Although it is true that this Court has expressly endorsed the discovery rule in these contexts, this Court's authority does not require artificially *limiting* the discovery rule to these categories. The three specific categories are illustrative of situations where the discovery rule needs to step in to prevent injustice against blameless plaintiffs with otherwise meritorious claims. See *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (endorsing discovery rule in field "where the cry for a discovery rule is loudest"). That principle counsels in favor of a discovery rule for civil claims brought pursuant to the Copyright Act, as discussed above.

---

[13] Petitioners' reliance on *Rotkiske* is also misplaced. In *Rotkiske*, the Court addressed the Fair Debt Collection Practice Act's statute of limitations, which, unlike Section 507(b), is unambiguously triggered when "the violation occurs," not when the injury is discovered. 140 S.Ct. at 360 (quoting 15 U.S.C. § 1692(d)).

IV. Petitioners' proposal would erase a substantial body of settled law and upend the expectations of copyright holders and users alike.

Because the circuit courts have unanimously adopted the discovery rule, eliminating the rule would require reversing decades of established law and practice nationwide. Such a dramatic change would affect both the courts, which would face a period of disruption and uncertainty as they work to apply any new rule, and also those whose livelihoods depend on making and using copyrighted works. Under the consensus reached by the circuit courts, creators and users of copyrighted works alike have enjoyed clarity regarding the standard by which the accrual of civil copyright claims is judged. Disregarding this consensus would upend the expectations of those who make and use copyrighted works and would generate uncertainty regarding the enforceability—and, ultimately, the value—of copyrighted works as a whole. This uncertainty will be a further disincentive to the creation of new works.

CONCLUSION

For these reasons, *amici* respectfully request the Court affirm the circuit court's decision.

Respectfully submitted,

BENJAMIN H. DIESSEL
Counsel of Record
ARMANDO GHINAGLIA
WIGGIN AND DANA LLP
265 Church Street
One Century Tower
New Haven, CT 06510
(203) 498-4304
bdiessel@wiggin.com

NATHAN E. DENNING
WIGGIN AND DANA LLP
437 Madison Avenue
35th Floor
New York, NY 10022
(212) 551-2600
ndenning@wiggin.com

Counsel for Amici Curiae

January 12, 2024