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
Case No. 2:20-CV-04085 DMG

BRIEF OF *AMICUS CURIAE* PROFESSOR TYLER T. OCHOA IN SUPPORT OF PLAINTIFF-APPELLEE STARZ ENTERTAINMENT, LLC AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Professor Tyler T. Ochoa is a Professor of Law with the High Tech Law Institute at Santa Clara University School of Law.[1] Professor Ochoa is a recognized expert in U.S. copyright law: he is currently the sole author of annual updates to the West treatise *The Law of Copyright*, by the late Howard B. Abrams. Professor Ochoa is also a co-author (with Craig Joyce and Michael Carroll) of a widely-used law school casebook, *Copyright Law* (Carolina Academic Press 11th ed. 2020), and the author of the Copyright chapter in the hornbook *Understanding Intellectual Property Law* (Carolina Academic Press 4th ed. 2020). Professor Ochoa has published 16 articles or book chapters on copyright law, one of which was cited by the U.S. Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003). Professor Ochoa also authored an *amicus* brief on behalf of 15 copyright and intellectual property law professors that was cited and relied on by a panel of this court in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167, 1173, 1175 (9th Cir. 2021). In addition to his expertise in copyright law, Professor Ochoa has published three articles on statutes of limitations, co-authored with Andrew J. Wistrich, U.S. Magistrate Judge, Central District of California (retired).

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[1] Pursuant to Fed. R. App. P. 29(a)(4), *amicus* certifies that no party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of the brief; and no person other than *amicus* contributed money intended to fund the preparation or submission of the brief. Both parties have consented to the filing of this brief.

Professor Ochoa is an unbiased observer who does not have any financial interest in the outcome of this litigation (except that he pays a monthly fee to his cable television provider to watch the premium Starz channel). The only interest that Professor Ochoa has in this litigation is a scholarly interest in both copyright law and statutes of limitations, and a commitment to the orderly development of both areas of law in the future.

SUMMARY OF ARGUMENT

Every Court of Appeals to have considered the issue has applied the discovery rule of accrual to the Copyright Act's statute of limitations in cases in which the plaintiff was justifiably ignorant of the existence of its cause of action. Ordinarily, the three-year statute of limitations means that a copyright owner can only recover damages for infringements occurring within three years before it filed its lawsuit. Under the discovery rule, however, a plaintiff may recover damages for infringements occurring *more* than three years before the lawsuit was filed, so long as the plaintiff filed within three years of the date that it discovered, or reasonably could have discovered, the existence of the infringement.

MGM argues that *even if* the discovery rule applies, the U.S. Supreme Court's opinion in *Petrella* requires that damages be limited to infringing acts occurring within three years before filing, regardless of the date of discovery. This

interpretation of *Petrella* is both incorrect and inherently self-contradictory: in effect, it applies a "wrongful act" or "occurrence" rule of accrual while purporting to retain the discovery rule. The proper approach is to *presume* that acts occurring more than three years before filing are barred, but to allow the copyright owner to recover damages for earlier acts if it shows that it did not discover the alleged infringement, and reasonably could not have discovered it, at an earlier time.

ARGUMENT

I. Every Court of Appeals to Have Considered the Issue Has Applied the Discovery Rule of Accrual in Cases Arising Under the Copyright Act.

"Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). In general, therefore, "[a] copyright claim thus arises or accrues when an infringing act occurs." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (internal quotes omitted).

In many instances, however, an injured plaintiff is unaware of his or her injury at the time of the wrongful act. In such instances, courts have seen fit to adopt a "discovery" rule of accrual. *See Petrella*, 572 U.S. at 670 n.4. As the Supreme Court explained in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), the discovery rule originated in cases of alleged fraud, where relief was sought in courts of equity, and was later applied to cases at law.

In *Bailey*, the Bankrupt Act of 1867 provided that "no suit at law or in equity shall in any case be maintainable … unless the same shall be brought *within two years from the time of the cause of action accrued* …" *Id*. at 344 (quoting the statute; emphasis added by the Court). Bailey, the assignee in bankruptcy, filed suit to set aside an alleged fraudulent conveyance, more than three years after he was appointed, and more than two years after the debtor had been discharged. The Court held that the discovery rule applied, even though the plain language of the statute did not admit of any exceptions:

> [W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, [even] though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. at 348. *Accord*, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey*). The Court explained that this principle was generally applicable:

> [W]e are of opinion … that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity…. [T]his is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence…. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey, 88 U.S. at 349. *See also Holmberg*, 327 U.S. at 397 (emphasis added):

> *This equitable doctrine is read into every federal statute of limitation*. If the [Act] had an explicit statute of limitation for bringing suit …, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception … which is the basis of this suit.

Over time, the Court began extending the discovery rule beyond cases involving fraud to other cases in which the plaintiff was justifiably ignorant of his or her cause of action, despite reasonable diligence. In *Urie v. Thompson*, 337 U.S. 163 (1949), for example, plaintiff brought suit under the Federal Employer's Liability Act for a respiratory disease, silicosis, contracted during the course of his employment. Urie filed suit on November 25, 1941, so under the three-year statute of limitations, "the court could not entertain the claim if Urie's 'cause of action accrued' before November 25, 1938." *Id*. at 169. Because Urie had been exposed to silica dust since 1910, Urie undoubtedly could have sued at an earlier time had he been aware of "the slow and tragic disintegration of his lungs." *Id*. Nonetheless, this Court held that the cause of action did not "accrue" until "Urie became too ill to work in May of 1940." *Id*. at 170. It explained:

> We do not think the [statute] intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time *after notice of the invasion of legal rights*…. There is no suggestion that Urie should have known he had silicosis at any earlier date.

Id. (emphasis added).

The Supreme Court has also recognized that the discovery rule applies to actions for medical malpractice under the Federal Torts Claims Act. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court noted that the Courts of Appeals had extended the discovery rule to medical malpractice claims, *id*. at 120 n.7, and it explained:

> That [the plaintiff] has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.

The Court also quoted from comment *e* to section 899 of the RESTATEMENT (SECOND) OF TORTS (1979), which explained that the discovery rule was an alternative to "various devices to extend the time of the statute," including equitable tolling:

> In a wave of recent decisions these various devices have been replaced by decisions meeting the issue directly and holding that the statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it. There have also been a number of instances in which a similar rule has been applied to other professional malpractice, such as that of attorneys or accountants *and the rule may thus become a general one*.

Kubrick, 444 U.S. at 120 n.7 (quoting the Restatement) (emphasis added).

The Restatement's prediction has largely come to pass. As the Supreme Court has recognized, "Federal courts … generally apply a discovery accrual rule

when a statute is silent on the issue." *Rotella v. Wood*, 528 U.S. 549, 555 (2000).[2] Moreover, the discovery rule can be considered to be one type of equitable tolling, and the Supreme Court has held that unless a statute of limitations is jurisdictional, it is subject to a rebuttable presumption that equitable tolling applies. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'"); *id*. at 95-96 (describing this principle as a "rebuttable presumption"); *United States v. Wong*, 575 U.S. 402, 407-08, 412 (2015) (applying *Irwin*'s rebuttable presumption to the Federal Tort Claims Act). Consequently, as the Supreme Court has noted, *every* Court of Appeals to have considered the issue has held that the discovery rule applies to copyright infringement claims. *Petrella*, 572 U.S. at 670 n.4 (collecting cases); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014) ("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."); Howard B. Abrams & Tyler T. Ochoa, *The Law of Copyright* §16:18 (West 2021 ed.) (collecting cases).

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[2] Of course, where a statute expressly limited the discovery rule to certain types of claims, the Court declined to apply the discovery rule as a default rule. *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001). Similarly, where a statute expressly stated that the time period runs "from the date on which the violation *occurs*," 15 U.S.C. § 1692k(d) (emphasis added), the Court applied the plain language of the statute. *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019).

II. The Effect of the Discovery Rule is to Extend the Reach of the Statute of Limitations to Permit the Recovery of Damages for Infringements That Occurred More Than Three Years Before Suit was Filed.

Petrella is a typical example of how the copyright statute of limitations ordinarily operates, in cases in which the discovery rule does *not* apply. In *Petrella*, the Supreme Court held that when a series of infringements occurs, the statute of limitations runs separately for each act of infringement, 572 U.S. at 671, so that the copyright owner ordinarily may recover damages only for those acts occurring within three years before the date the lawsuit was filed. *Id*. at 672.

Petrella's claim was based on her ownership of the renewal term in her father's 1963 screenplay, on which the 1980 movie *Raging Bull* was based.[3] *Id*. at 673-74. Her claim accrued at the beginning of the renewal term, on January 1, 1992.[4] At that time, Petrella was fully aware that *Raging Bull* had been based, in part, on her father's screenplay; that the movie had been released; and that it continued to be publicly performed and distributed to the public on videotape, so

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[3] For works published or registered between 1909 and 1977, the Copyright Act provided an initial term of 28 years, which could be renewed for a second term. 17 U.S.C. § 304(a) (1991). At the time Petrella registered the renewal term in her father's screenplay, in 1991, the second term had a duration of 47 years. *Id*. In 1998, the renewal term was extended to 67 years, for a total of 95 years of copyright protection. 17 U.S.C. § 304(b).

[4] For a work registered in 1963, the initial 28-year term lasted until December 31, 1991. 17 U.S.C. § 305 ("All terms of copyright … run to the end of the calendar year in which they would otherwise expire.").

she could not credibly claim the benefit of the discovery rule.[5] Nonetheless, she delayed filing suit until January 6, 2009. Accordingly, the Supreme Court held that she could claim damages "only for acts of infringement occurring on or after January 6, 2006." *Id*. at 675.

Where the discovery rule applies, however, it allows damages to be recovered for acts occurring *more* than three years before an action was filed, so long as the plaintiff files the action within three years of the date she discovers, or reasonably could have discovered, the existence of the claim. *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004). In *Polar Bear*, the defendant infringed by using footage from the plaintiff's copyrighted work at twelve different trade shows between 1995 and 1998. *Id*. at 704. Polar Bear first became aware of the infringement when a producer attended one of the trade shows on August 9, 1997. *Id*. at 707. "Polar Bear filed its complaint against Timex on August 3, 2000, and thus Polar Bear commenced its suit 'within three years after the claim accrued.'" *Id*. Like MGM in this case, Timex argued that the three-year statute of limitations "prohibits copyright plaintiffs from obtaining any damages resulting

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[5] As this Court stated in dismissing Petrella's claims on grounds of laches, "it is undisputed Petrella was aware of her potential claims (as was MGM) since 1991, when her attorney filed her renewal application for the 1963 screenplay." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 952 (9th Cir. 2012) (internal quotes and brackets omitted), *rev'd on other grounds*, 572 U.S. 663 (2014) (holding laches could not bar an action that was timely filed within the three-year statute of limitations).

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 specifically rejected that argument, holding instead 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. Because Polar Bear did not discover Timex's infringement until within three years of filing suit, Polar Bear may recover damages for infringement that occurred outside of the three-year window.

Polar Bear, 384 F.3d at 706.

Similarly, in *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120 (2d Cir. 2014), defendant allegedly infringed eight of plaintiff's photographs by publishing them without authorization "in various textbooks" between 2005 and 2009. The plaintiff discovered the infringement in November 2010, when Wiley sought a retroactive license for one of the photos. He sued for infringement in March 2011. A three-year lookback period would have limited damages to infringements that occurred no later than March 2008; but the court held "that under the discovery rule[,] *none* of Psihoyos's claims are time-barred." *Id*. at 124 (emphasis added); *see also id*. at 125 ("we conclude that copyright infringement claims do not accrue until actual or constructive discovery of the relevant infringement and that the Act's statute of limitations did not bar *any* of Psihoyos's infringement claims.") (emphasis added).

Nothing in the Supreme Court's subsequent opinion in *Petrella* displaces, or even purports to displace, the operation of the discovery rule in those exceptional cases in which it applies. In *Petrella*, there was no question that the discovery rule did not apply, and the plaintiff did not claim that it did. Accordingly, the Supreme Court simply acknowledged, in a footnote, that "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.'" *Petrella*, 572 U.S. at 670 n.4. There was no further need to discuss or to rule on any aspect of the discovery rule, because it obviously did not apply to Petrella's claim, so it would not have affected the outcome. Moreover, the Supreme Court repeatedly qualified its opinion with language indicating that the three-year period is subject to exceptions. *Petrella*, 572 U.S. at 670 ("A claim *ordinarily* accrues …" and "the limitation period *generally* begins to run …") (emphasis added); *id*. at 672 ("when a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder's suit *ordinarily* will be timely under § 507(b) [only] with respect to more recent acts of infringement (i.e., acts within the three-year window), but untimely with respect to prior acts of the same or similar kind.") (emphasis added).

III. The Second Circuit's Opinion in *Sohm* is Inherently Self-Contradictory and Effectively Eliminates the Discovery Rule While Purporting to Preserve It.

In *Sohm v. Scholastic, Inc.*, 959 F.3d 39 (2d Cir. 2020), photographer Sohm licensed publisher Scholastic to use numerous photographs in its publications. The licenses were granted between 1995 and 2011. First Amended Complaint ¶11. In May 2016, Sohm sued Scholastic for infringement, alleging that it had exceeded the contractual limitations in the licenses as to the "number of copies, distribution area, language, duration, and/or media." First Amended Complaint, ¶11. After discovery revealed details of the infringements, Sohm filed an amended complaint, alleging 117 infringing uses of 89 different photographs. 959 F.3d at 42.

Sohm moved for summary judgment with respect to 13 uses; Scholastic responded that the claims were barred by the statute of limitations. "Scholastic [did] not contend that Plaintiffs had actual notice of the relevant infringements, but rather [it argued] that Plaintiffs, with due diligence, *should have* discovered the infringing acts more than three years before bringing their claims." *Sohm v. Scholastic, Inc.*, 2018 WL 1605214, at *11 (S.D.N.Y. Mar. 29, 2018) (emphasis added). The district court rejected the argument: "Without identifying any information that would have *prompted* such an inquiry, … Scholastic cannot simply rely on the passage of time to establish that Plaintiffs reasonably should have discovered any infringement." *Id*. (emphasis in original). Scholastic also argued

that under *Petrella*, the claims accrued at the time the infringements had occurred. The district court dismissed that argument in a footnote. *Id*. at n.21. Accordingly, the district court "reject[ed] Scholastic's argument that damages should be limited to three years before the filing of this case." *Id*. at *11.

On appeal, the Second Circuit held that "[t]he Supreme Court [in *Petrella*] has not overruled *Psihoyos*, either implicitly or explicitly, and therefore we must continue to apply the discovery rule." 959 F.3d at 50. The Second Circuit also upheld the district court's determination that Scholastic had failed to demonstrate that Sohm should have discovered the infringements at an earlier time. *Id*. at 51. "Accordingly, the district court properly rejected Scholastic's affirmative defense based on the Copyright Act's statute of limitations." *Id*.

Then, in a bizarre departure from the usual operation of the discovery rule, the Second Circuit nonetheless held that "in *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the commencement of a copyright infringement action." *Id*.; *see also id*. at 52 ("we must apply the discovery rule to determine when a copyright infringement claim accrues, but a three-year lookback period from the time a suit is filed to determine the extent of the relief available" and "a plaintiff's recovery is limited to damages incurred during the three years prior to filing suit.").

With due respect to the Second Circuit, this dual holding is inherently self-contradictory. Under *Petrella*'s separate-accrual rule, any damages resulting from infringements that occurred within three years of filing can *already* be recovered under the three-year statute of limitations, even if the plaintiff had long been aware that the defendant was infringing.[6] The discovery rule is *only* needed or useful to recover damages for infringements that occurred *more* than three years before suit was filed, in those cases in which a plaintiff was blamelessly ignorant that those infringements had occurred.[7] In such cases, the discovery rule allows the plaintiff to file suit within three years of the date that it reasonably became aware of the infringement, rather than within three years of the date of the infringing act. By limiting damages to three years before the date the suit was filed, the court in effect was adopting an injury rule of accrual, even though it claimed that it was using the discovery rule of accrual. *Sohm* effectively eliminates the discovery rule while purporting to preserve it.

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[6] Indeed, that is precisely what happened in *Petrella*: she was allowed to recover damages for infringements occurring within three years of the date she filed suit in 2016, even though she had been aware of the existence of her claim since 1991, some 18 years earlier.

[7] As the lower court stated in this case, "[i]f plaintiffs cannot recover for infringements that occurred more than three years before the lawsuit commenced, even if they were not aware of the infringements, then the discovery rule serves no practical purpose." *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 510 F. Supp. 3d 878, 887 (C.D. Cal. 2021).

Attempting to justify its bizarre decision, the court stated "that *Petrella*'s plain language explicitly dissociated the Copyright Act's statute of limitations from its time limit on damages." *Sohm*, 959 F.3d at 52. That assertion is simply incorrect. *Petrella*'s three-year "time limit on damages" was *expressly* based on the Copyright Act's three-year statute of limitations. *See Petrella*, 572 U.S. at 670 (describing 17 U.S.C. § 507(b) as "a three-year look-back limitations period"); *id.* at 672 ("the copyright holder's suit *ordinarily* will be timely *under § 507(b)* [only] with respect to more recent acts of infringement (*i.e.*, acts within the three-year window)") (emphasis added); *id.* at 672 ("§ 507(b)'s limitations period … allows plaintiffs during [the copyright] term to gain retrospective relief running only three years back from the date the complaint was filed.").

Sohm's self-contradictory reasoning has not gone unnoticed. Within three months of the decision, I published a blog post criticizing the decision. *See* Tyler Ochoa, *A Second Circuit Panel Misunderstands the Copyright Act's Statute of Limitations*, at https://blog.ericgoldman.org/archives/2020/08/a-second-circuit-panel-misunderstands-the-copyright-acts-statute-of-limitations-guest-blog-post.htm (Aug. 7, 2020); *see also* Howard B. Abrams & Tyler T. Ochoa, *The Law of Copyright* §16:18 (West 2021 ed.). Nimmer likewise agrees that the *Sohm* opinion is self-contradictory. *See* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §12.05[B][2][d][ii] (Lexis 2021 ed.) ("But, immediately after nominally

reaffirming the discovery rule, *Sohm v. Scholastic* took a hundred-and-eighty degree turn…. In sum, the practical import of this case is to adopt the injury rule and reject the discovery rule that it had previously upheld.").[8] Lower courts, including the district court in this case, have likewise recognized that *Sohm*'s interpretation of *Petrella* "effectively obliterates the discovery rule." *Mitchell v. Capitol Records, LLC*, 287 F. Supp. 3d 673, 677 (W.D. Ky. 2017) (rejecting a similar argument pre-*Sohm*); *see Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 510 F. Supp. 3d 878, 887 (C.D. Cal. 2021) ("a strict damages bar would 'eviscerate' the discovery rule"); *D'Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.*, 516 F. Supp. 3d 121, 135 (D.N.H. 2021) ("this court respectfully disagrees with the Second Circuit's interpretation [in *Sohm*].").[9]

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[8] Prof. Patry's position is unclear. He heaps praise on the lower court's opinion in this case (*Starz v. MGM*): "Judge Dolly Gee of the Central District of California, in a very scholarly, thorough opinion[,] reviewed *Petrella* and subsequent case law on the relationship between when the limitations period begins and when the cut-off for damages is," and he states that "her conclusion … is sound." William F. Patry, *Patry on Copyright* § 20:18, at n. 12.50 (West 2021 ed.). In a different section of his treatise, however, he cites *Sohm v. Scholastic* with apparent approval. *Patry on Copyright* § 20:23, at n. 3.60. Those positions cannot both be correct, as Judge Gee's opinion *rejected* the holding in *Sohm v. Scholastic*.

[9] Indeed, even a district court that agreed with *Sohm* recognizes that the effect of limiting damages to a three-year lookback period "appears to be the functional equivalent of an occurrence rule [of accrual]." *Navarro v. Procter & Gamble Co*., 515 F. Supp. 3d 718, 761 (S.D. Ohio 2021); *see also id*. at 761 (adopting such an interpretation of *Petrella* "functionally overrules the discovery rule"); *id*. at 762 ("as a practical matter, the effects of a limited three-year lookback [period] result in a form of [the] occurrence rule").

CONCLUSION

MGM argues that *even if* the discovery rule applies, the U.S. Supreme Court's opinion in *Petrella* requires that damages be limited to infringing acts occurring within three years before filing, regardless of the date of discovery. This interpretation of *Petrella* is both incorrect and inherently self-contradictory: in effect, it applies a "wrongful act" or "occurrence" rule of accrual while purporting to retain the discovery rule. The *only purpose* of the discovery rule is to allow a copyright owner to recover damages for infringements occurring *more than* three years before the suit was filed, so long as the copyright owner filed suit within three years of the date that it discovered, or reasonably could have discovered, the alleged infringement. A hard three-year limit on damages, therefore, is fundamentally inconsistent with the discovery rule of accrual.

Respectfully submitted,

Dated November 3, 2021

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CERTIFICATE OF SERVICE

I, Tyler T. Ochoa, hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 3, 2021, which will send notice of such filing to all registered CM/ECF users.

/s/ *Tyler T. Ochoa*

Tyler T. Ochoa