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**WHEN WILL IT END? WHY THERE IS NO PRACTICAL
STATUTE OF LIMITATIONS FOR ONLINE COPYRIGHT
INFRINGEMENT AND WHY LIBEL LAW CAN OFFER THE
SOLUTION**

Mark Marciszewski*

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I. INTRODUCTION

[1] Outside of crimes considered heinous by society, every civil and criminal action has some statute of limitations that describe when a party can bring a timely claim.¹ These statute of limitation laws help facilitate effective resolutions to legal conflicts within reasonable lengths of time.² This ensures that plaintiffs with a valid cause of action pursue their claim with reasonable diligence and prevents delays in bringing a claim that would result in a defendant losing necessary evidence to disprove that claim.³

[2] Copyright law and the internet have often been the center of litigation, either with the prevalence of online copyright piracy or new technologies like file sharing networks. However, the case law regarding the statute of limitations for copyright infringement has developed outside of cases involving activities online or internet technologies.⁴ This has allowed the classic situation of “bad facts make bad law,” where previous court decisions have failed to consider the implication of online technologies.⁵ Courts are bound by precedent to decide cases consistent with language in prior adjudications, but doing so in light of how content is

¹ See Paul D. Rheingold, 4 AM. JUR. *Trials* 441 § 2 (Supp. 2020) (“Limitation of actions is controlled by statute and every state has a comprehensive set of statutes setting forth the period of limitations for all, or substantially all, actions within the state which arise either by virtue of statute or common-law principles. In addition, many federal statutes creating causes of action contain statutory periods of limitation.”).

² Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 498 (2015).

³ See *id.* at 502.

⁴ See, e.g., *Petrella v. MGM, Inc.*, 572 U.S. 663 (2014) (determining copyright statute of limitations on a movie from 1963).

⁵ See, e.g., *id.* at 692 (Breyer, J., dissenting); see also Barry Green, *Bad Facts and Bad Law*, WISE COUNTY ON THE WEB (May 5, 1998), <http://www.wisecounty.com/themuse/Cuellar.htm> [<https://perma.cc/JBV7-JJ9E>] (analyzing the adage “bad facts make bad law”).

stored and distributed on the internet will create problematic results and perverse incentives in future cases.

[3] In Part II, this article will outline a background of statute of limitations and copyright law. First, it discusses the general purpose and policy rationales for statute of limitations for civil claims. Then, it looks at the specific statute of limitations for civil copyright claims and how different circuit courts have interpreted when a filed claim is timely. Specifically, it explains the distinctions between the “continuing wrong” interpretation and the “separate accruing infringement” interpretation of the statute of limitations. Finally, it briefly addresses and critiques the Supreme Court decision in *Petrella v. MGM*, which eliminated the laches defense for civil copyright claims seeking monetary relief.⁶

[4] Part III of this article examines the intersection of the 1976 Copyright Act’s statute of limitations and copyright infringement on the internet. It begins with an analysis of the recent *APL Microscopic, LLC v. United States* decision, which finally adjudicated a claim of copyright infringement on the internet that was filed more than three years after the initial posting of the infringing content.⁷ This article contrasts how the internet should impact the definition of the exclusive rights granted by the Copyright Act with how the court chose to analyze these exclusive rights. Then, it illustrates how the remedy of statutory damages, which is mentioned at the end of the *APL Microscopic* decision, would create problematic results and incentives if subsequent courts continue to follow the troubling precedent on the Copyright Act’s statute of limitation outlined by *Petrella* and *APL Microscopic*.⁸

[5] In Part IV, this article proposes possible solutions to the problem presented by the current case law addressing the Copyright Act’s statute of limitations and infringement on the internet. First, it looks to libel law as

⁶ *Petrella*, 572 U.S. at 667.

⁷ *APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489, 491–93 (2019).

⁸ *See id.* at 499; *Petrella*, 572 U.S. at 686–87.

inspiration to support adopting a “single publication” rule for copyright infringement on the internet. It then addresses any concerns of inequity from adopting the “single publication” rule by reinforcing the effects of the other exceptions to a statute of limitations defense. Finally, it supports legislative action to clarify that the 1976 Copyright Act intended for the laches defense to be an appropriate defense against claims filed with unreasonable delay and prejudicial effects.

II. BACKGROUND

A. Purpose of Statute of Limitations

[6] Legal scholars have long contemplated and debated the purposes of statutes of limitations.⁹ Although numerous reasons are cited and explored, statutes of limitations are widely accepted as “vital to the welfare of society.”¹⁰ In fact, many scholars and courts regularly cite similar purposes for statute of limitations, “suggesting that statutes of limitations do have discernable goals for which they were created.”¹¹ Although there are many rationales for statutes of limitations, the two most frequently debated and cited by scholars are: (1) to provide fairness to the defendant; and (2) to ensure courts have sufficient evidence to decide cases accurately.¹²

⁹ See ROGER C. CRAMTON ET AL., CONFLICT OF LAWS: CASES–COMMENTS–QUESTIONS 59 (5th ed. 1993) (posing questions about what purposes statutes of limitations serve); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 74 (2005) (“The dearth of scholarship on the rationales for limitations periods and their concomitant exceptions is troubling. The absence suggests that inertia may be at work, a notion that Justice Holmes correctly found disturbing . . .”).

¹⁰ *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

¹¹ See, e.g., Lambert, *supra* note 2, at 497 (emphasis omitted).

¹² *Id.*; Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 457, 471–72 (1997); HALSBURY’S LAWS OF ENGLAND 407 (Lord Hailsham of St. Marylebone et al. eds., 4th ed. 1997).

1. Provide Fairness to the Defendant

[7] The goal of providing fairness to the defendant is “[p]erhaps the most widely cited purpose of statutes of limitations.”¹³ The Supreme Court has held that statutes of limitations help “promote repose by giving security and stability to human affairs,”¹⁴ and “are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber”¹⁵ Statutes of limitation achieve this goal by requiring timely notice to potential defendants¹⁶ to ensure that both parties have an equal opportunity to gather evidence while the facts are still “fresh.”¹⁷

[8] Delay in filing a claim usually disadvantages the defendant rather than the plaintiff since the plaintiff “can take steps to preserve evidence favorable to his or her case while evidence that favors the defendant deteriorates.”¹⁸ In the extreme, a plaintiff could engage in “time shopping” and delay filing a suit until a time more advantageous for themselves and

¹³ Lambert, *supra* note 2, at 498; *see also* Ochoa & Wistrich, *supra* note 12, at 483 (“One of the most powerful policies supporting limitation of actions is the concern that the passage of time will not only result in the deterioration of evidence, but that it will also allow the plaintiff to gain an unfair advantage over the defendant.”).

¹⁴ *Carpenter*, 101 U.S. at 139.

¹⁵ *Ord. of R.R. Telegraphers. v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944); *see also* *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (observing that statutes of limitations “represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time”).

¹⁶ *See* *Wenke v. Gehl Co.*, 682 N.W.2d. 405, 412 (Wis. 2004) (holding that statutes of limitations serve as “notice to a potential defendant of when it will be required to defend a suit.”); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (“Limitations periods are intended to put defendants on notice of adverse claims”).

¹⁷ *Davies v. Krasna*, 535 P.2d 1161, 1168 (Cal. 1975); *Elkins v. Derby*, 525 P.2d 81, 83 (Cal. 1974).

¹⁸ Ochoa & Wistrich, *supra* note 12, at 484.

less advantageous for the defendant.¹⁹ As a result, “[d]efendants could find themselves at the mercy of unscrupulous plaintiffs who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense.”²⁰ The statutes of limitations instead allow “society to move forward in its business, social, and political processes without fear of having dramatic upheavals based on judicial resolutions of old claims.”²¹ The Supreme Court has held that a “statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind”²²

[9] Allowing a potential plaintiff the option to delay bringing a claim would allow evidence favorable to the potential defendant to deteriorate.²³ Even if a defendant ultimately succeeds, they are prejudiced since “the cost of mounting a defense is increased by the passage of time.”²⁴ Increased defense costs can incur during discovery due to the difficulty of finding older documents that may have been lost or deleted, the cost of tracking down witnesses that may have dispersed or deceased, and the task of reviving fading memories of witnesses.²⁵ If a plaintiff willfully or otherwise chooses to delay filing a lawsuit, defendants who are unaware of the

¹⁹ *Id.*

²⁰ *Burns v. Bd. of Supervisors*, 315 S.E.2d 856, 859 (Va. 1984).

²¹ *Lambert*, *supra* note 2, at 500.

²² *Walker v. Armco Steel Corp.*, 466 U.S. 740, 751 (1980).

²³ *Ochoa & Wistrich*, *supra* note 12, at 484 (“Permitting the plaintiff a one-sided option to delay before commencing suit allows the plaintiff to speculate on the extent to which evidence will deteriorate, as well as about whether that deterioration will adversely affect one side more than the other.”).

²⁴ *Id.*; *cf.* *Wyatt v. Union Mortg. Co.*, 598 P.2d 45, 53 (Cal. 1979) (“Statutes of limitations have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims.”).

²⁵ *Ochoa & Wistrich*, *supra* note 12, at 484.

potential lawsuit are subjected to unnecessarily high litigation costs and potential prejudices in defending the claims.

[10] If both the potential plaintiff and defendant are unaware of a potential claim and of the need to preserve evidence, then both “will be equally vulnerable to the deterioration of evidence through the passage of time.”²⁶ However, if both parties know of a claim and the victim is allowed an unlimited time to sue, the potential defendant “would be faced with the unsavory choice of initiating litigation against himself or herself or facing perpetual uncertainty. In this situation, therefore, limitation of actions properly places the burden of going forward on the party seeking to alter the status quo.”²⁷ Of the four possible combinations of knowledge of a potential claim,²⁸ two situations give the plaintiff an unfair advantage²⁹ while the other two are ambiguous.³⁰ However, the latter two may be covered by the discovery rule.³¹ As a result, many cases have recognized that one of the purposes of a statute of limitation is to avoid creating unreasonable difficulties for defendants attempting to defend a claim against them.³²

²⁶ *Id.* at 486.

²⁷ *Id.*

²⁸ (1) *both* plaintiff and defendant aware of potential claim; (2) *only plaintiff* is aware of potential claim; (3) *only defendant* is aware of potential claim; and (4) *both* plaintiff and defendant are unaware of potential claim.

²⁹ (1) *both* plaintiff and defendant aware of potential claim and (2) *only plaintiff* is aware of potential claim;

³⁰ (3) *only defendant* is aware of potential claim and (4) *both* plaintiff and defendant are unaware of potential claim

³¹ See discussion *infra* Section IV(c).

³² *E.g.*, *Bernson v. Browning-Ferris Indus. of Cal., Inc.*, 873 P.2d 613, 935 (Cal. 1994) (“Such statutes [of limitation] . . . mitigate the difficulties faced by defendants in defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation, may present unfair handicaps.”); *Addison v. State*, 578 P.2d 941, 943 (Cal. 1978) (“The statutes [of limitation], accordingly, serve a distinct public purpose, preventing the assertion of demands which through the unexcused lapse of time,

2. Ensure Courts Have Sufficient Evidence

[11] Additionally, statutes of limitations ensure that courts have sufficient evidence to decide cases accurately, which is “one of the most important jobs that a court has.”³³ The most important reason for avoiding the deterioration of evidence and ensuring courts have sufficient evidence is that the loss of evidence makes the accurate and just adjudication of claims less likely.³⁴

[12] Sufficiency of evidence includes both the quantity and quality of the evidence. Even absent a statutes of limitations violation, courts have long shown concern for evidence being lost as a result in delays in litigation.³⁵ As far back as 1828, the Supreme Court held that statutes of limitations protect “against stale demands, after the true state of the transaction may

have been rendered difficult or impossible to defend.”).

³³ Lambert, *supra* note 2, at 501; *see also* Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J. L. & ECON. 1, 1 (1994) (“The degree of accuracy is a central concern of adjudication.”); *cf.* Wm. Grayson Lambert, *Toward a Better Understanding of Ripeness and Free Speech Claims*, 65 S.C. L. REV. 411, 423 (2013) (observing that the ripeness test for free speech claims helps the court decide cases accurately).

³⁴ *See* Bd. of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980) (“The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh . . . there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.”); *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979) (asserting that statutes of limitation “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”); Lambert, *supra* note 2, at 502 (“These concerns about lost evidence form another important purpose of statutes of limitations.”).

³⁵ *See, e.g.,* Mo., Kan., & Tex. Ry. Co. v. Harriman Bros., 227 U.S. 657, 672 (1913) (observing that delays can result in the “death or disappearance of witnesses, destruction of documents, or failure of memory”).

have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.”³⁶ The goal is to require plaintiffs to sue before “evidence has been lost, memories have faded, and witnesses have disappeared.”³⁷ “The longer the period between operative fact and legal judgment, the more likely it is that error will creep in: memories will fade, evidence will disappear or become unreliable.”³⁸

[13] Although the loss of evidence due to delay usually prejudices the defendants who have to defend against a claim without all of the evidence that was once available,³⁹ it also can prejudice a plaintiff who would have had a better case if the evidence was still “fresh and reliable.”⁴⁰ Accurate fact finding in adjudication is an important goal of the American legal system.⁴¹ “[P]unishing an innocent defendant with civil liability is no less

³⁶ *Bell v. Morrison*, 26 U.S. 351, 360 (1828); *see also* *Barrington v. A.H. Robins Co.*, 702 P.2d 563, 566 (Cal. 1985) (noting that statutes of limitations “were enacted to promote the trial of the case before evidence is lost or destroyed, and before witnesses become unavailable or their memories dim”).

³⁷ *Ord. of R.R. Telegraphers. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944); *see also* *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (“Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims.”).

³⁸ Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1182 (1986).

³⁹ *See, e.g., Kubrick*, 444 U.S. at 117 (noting that statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”).

⁴⁰ Lambert, *supra* note 2, at 504 (“Statutes of limitations therefore do not necessarily always benefit the plaintiff or the defendant. Rather, if a case is timely filed, statutes of limitations benefit the side that has the evidence to win the case.”).

⁴¹ Kaplow & Shavell, *supra* note 33, at 1 (“The degree of accuracy is a central concern of adjudication.”); Daniel R. Ortiz, *Neoactuarialism: Comment on Kaplow (I)*, 23 J. LEGAL STUD. 403, 403 (1994) (“Accuracy is a central, if not *the* central, value of adjudication.”); *cf.* Stephen McG. Bundy, *Valuing Accuracy—Filling Out the*

unjust than denying compensation to a deserving victim. Shifting a plaintiff's loss to an innocent defendant merely substitute one victim for another."⁴² Although some legal realist scholars believe perfect accuracy is almost always an unobtainable ideal,⁴³ the courts' responsibilities are more than simply resolving controversies. If the legal system's goal was "simply to resolve controversies, that could be accomplished quickly and inexpensively by flipping a coin."⁴⁴ However, courts and interested parties go through the trouble and expense of litigation, including discovery and trials, because they believe the legal process will produce legitimate final results that will be more often than not correct.⁴⁵ The "legal system has to play the odds. The passage of time is correlated with a wide variety of factors, each of which makes it less likely that a lawsuit will reach the correct outcome."⁴⁶ Civil statutes of limitations help protect this belief by prohibiting ancient claims to be filed that could lead to inaccurate results.⁴⁷ The common shared belief is that "evidence deteriorates as time passes, and this belief is supported by our common experience and intuition."⁴⁸

Framework: Comment on Kaplow (2), 23 J. LEGAL STUD. 411, 433 (1994) ("Accuracy is a central aspiration of any procedural system, but it cannot be the only aspiration.").

⁴² Ochoa & Wistrich, *supra* note 12, at 472–73.

⁴³ See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14–16 (1949) (explaining that facts are merely guesses about the facts).

⁴⁴ Ochoa & Wistrich, *supra* note 12, at 473 (adding that coin flip decisions, however, would "lack legitimacy"); see generally Judith Resnik, *Tiers*, 57 CAL. L. REV. 837, 840–41 (1984) (describing the outrage that resulted when a judge flipped a coin to determine whether a convicted defendant would serve 20 or 30 days in jail).

⁴⁵ Ochoa & Wistrich, *supra* note 12, at 473–74.

⁴⁶ Epstein, *supra* note 38, at 1183.

⁴⁷ See, e.g., CAL. CIV. PROC. CODE § 337 (Deering 2020).

⁴⁸ Ochoa & Wistrich, *supra* note 12, at 474; see also *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("time is constantly destroying the evidence of rights.").

[14] Plaintiffs with non-stale claims may potentially be unable to recover, but “the law is not based on the exceptional case. Rather, legal rules are designed to produce the proper result in the majority of cases, which is what statutes of limitations do with regard to ensuring that courts have sufficient evidence to decide cases properly.”⁴⁹

B. Copyright Act’s Statute of Limitations

[15] The statute of limitations for civil copyright claims is codified in 17 U.S.C. § 507 (b), providing a three year window to bring a claim after that claim accrues.⁵⁰ “A cause of action accrues when a plaintiff knows of the infringement or is chargeable with such knowledge.”⁵¹ “Because each act of infringement is a distinct harm, the statute of limitations bars infringement claims that accrued more than three years before suit was filed, but does not preclude infringement claims that accrued within the statutory period.”⁵² Because “[e]ach act of infringement is a distinct harm giving rise to an independent claim for relief,”⁵³ a potential plaintiff can only bring a claim within three years of the “last infringing act.”⁵⁴ This interpretation,

⁴⁹ Lambert, *supra* note 2, at 505–06 (“And moreover, any plaintiff in this situation bears some fault, as the plaintiff could have sued earlier, before the statute of limitations ran.”).

⁵⁰ 17 U.S.C. § 507(b).

⁵¹ Bridgeport Music, Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 621 (6th Cir. 2004).

⁵² *Id.*; *see also* Hoey v. Drexel Sys. Corp., 716 F. Supp. 222, 223 (E.D. Va. 1989) (“It appears, however, that § 507 (b) is clear on its face. It does not provide for a waiver of infringing acts within the limitation period if earlier infringements were discovered and not sued upon, nor does it provide for any reach back if an act of infringement occurs within the statutory period. In a case of continuing copyright infringements an action may be brought for all acts which accrued within the three years preceding the filing the suit.”); Baxter v. Curtis Indus., Inc., 201 F. Supp. 100, 101 (N.D. Ohio 1962).

⁵³ Stone v. Williams, 970 F.2d 1043, 1049 (2d Cir. 1992).

⁵⁴ *See* Luar Music Corp. v. Universal Music Grp., Inc., 847 F. Supp. 2d 299, 306 (D.P.R. 2012) (“[E]ach infringing act is subject to a separate statute of limitations period.”); *see also* Roley v. New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994) (holding that in cases of continuing copyright infringements, action may be brought for all acts that

known as the “separate accrual rule,” is “widely recognized” as the proper interpretation of the copyright statute of limitations.⁵⁵

[16] As long as infringing acts occur within three years of the filing of the claim, the plaintiff can recover for those infringements, but they are limited to only those infringements they can prove occurred during that three year period.⁵⁶ In *Roley v. New World Pictures*, the plaintiff had knowledge of a claim in 1987 when seeing the opening screening of allegedly infringing work but did not file until February of 1991.⁵⁷ The Ninth Circuit affirmed the district court’s summary judgement on the grounds that the statute of limitations barred recovery because the plaintiff failed to “produce any evidence that [defendants] engaged in actionable conduct after February 7, 1988 [the date three years before filing the claim]...his assertions rely on naked allegations and speculation.”⁵⁸

[17] This “separate accrual” interpretation “is consistent with the prevailing view that [Section 507(b)] bars recovery on any claim for damages that accrued more than three years before commencement of the suit.”⁵⁹ However, at least one circuit court has adopted a “continuing

accrued within three years preceding filing of suit); *United States v. Shabazz*, 724 F.2d 1536, 1540 (11th Cir. 1984) (holding that in copyright infringement actions, periods of limitation begins on date of last infringing act); *TMTV Corp. v. Pegasus Broad. of San Juan*, 490 F. Supp. 2d 228, 232 (D.P.R.2007) (“Copyright infringement claims can accrue more than once, because infringement is a distinct harm.”).

⁵⁵ *Petrella v. MGM*, 572 U.S. 663, 671 (2014).

⁵⁶ *Hoey*, 716 F. Supp. at 223.

⁵⁷ *Roley*, 19 F.3d at 480.

⁵⁸ *Id.* at 482.

⁵⁹ *Id.* at 481; *see also* *Stone v. Williams*, 970 F.2d 1043, 1049–50 (2d Cir. 1992); *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 987 n. 9 (10th Cir. 1992); *Hoste v. Radio Corp. of America*, 654 F.2d 11 (6th Cir. 1981); *Hoey*, 716 F. Supp. at 223; *Gaste v. Kaiserman*, 669 F. Supp. 583, 584 (S.D.N.Y. 1987); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.05[B][1][b] (Matthew Bender, Rev. Ed. 2013).

wrong” interpretation of the statute of limitations rule instead.⁶⁰ The Seventh Circuit has held that it is “the general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with.”⁶¹ As long as the “final act of an unlawful course of conduct occurs within the statutory period,” the Seventh Circuit has reasoned that the rationales for statutes of limitations are “adequately served.”⁶² A plaintiff can “reach back and get damages for the *entire duration* of the alleged violation,” since “*some* of the evidence, at least, will be fresh.”⁶³ This viewpoint is clearly problematic since it overlooks the potential prejudices to defendants if only “some of the evidence” that is remaining is only beneficial to the plaintiff, with any evidence that would have been beneficial to the defendant becoming stale. It would be against the statutes of limitations fairness and accuracy rationales.⁶⁴ However, the Seventh Circuit held the contrary.⁶⁵

[18] In *Taylor v. Meirick*, the Seventh circuit held that a defendant’s infringement was a “continuing wrong” when he copied plaintiff’s copyright maps in 1976 and 1977 and “either sold copies till 1979, [which was one year before filing of the lawsuit and within the three year statute of limitations], or at least became party to infringements by his dealers which continued till after the suit was filed.”⁶⁶ The court held that “[t]he initial copying was not a separate and completed wrong but simply the first step

⁶⁰ *Overton v. Health Commc’ns, Inc.*, No. 10-cv-701-wmc, 2012 WL 13069986, at *6 (W.D. Wis. Feb. 3, 2012) (noting that the 7th Circuit follows the continuing harm standard rather than barring recovery under the copyright statute of limitations periods).

⁶¹ *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983).

⁶² *Id.* at 1119.

⁶³ *Id.* (emphasis added).

⁶⁴ *See Ochoa & Wistrich*, *supra* note 12, at 483–84 (citations omitted).

⁶⁵ *See Meirick*, 712 F.2d at 1118–19.

⁶⁶ *Id.* at 1119 (alteration in the original).

in a course of wrongful conduct that continued till the last copy of the infringing map was sold by [defendant] or his connivance.”⁶⁷ As a result, the plaintiff was able to consider infringements that were outside of the three year statute of limitations, taking place in 1976 and 1977, in its damages calculations.⁶⁸

[19] Although the Seventh Circuit continues to apply a “continuing wrong” interpretation of the statute of limitations for continuing infringements, most circuits have firmly accepted the “separate-accrual” rule as the proper interpretation of copyright infringement’s statute of limitations.⁶⁹

C. *Petrella v. MGM*

[20] After the development of the case law on the “separate accrual rule” and the “continuing wrong” interpretation of copyright’s statute of limitations, the next pertinent question the Supreme Court faced was whether the Copyright Act permitted the defense of laches.⁷⁰ In *Petrella*, the plaintiff delayed bringing a claim until eighteen years after she had knowledge of the claim, which the defendant maintained “was unreasonable and prejudicial.”⁷¹ Both the District Court and the Ninth Circuit agreed with the defendant and dismissed the case on the defense of laches.⁷² The

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Petrella v. MGM Inc.*, 572 U.S. 663, 671 (2014) (“It is widely recognized that the separate-accrual rule attends the copyright statute of limitations.”); NIMMER & NIMMER, *supra* note 59, at § 12.05[C][4].

⁷⁰ See *Petrella*, 572 U.S. at 668.

⁷¹ *Id.* at 675.

⁷² *Id.* at 676 (finding that the defendant would encounter “evidentiary prejudice” because the plaintiff’s father (the original holder of the copyright) had died and the co-writer of the original work, then age 88, appeared to have sustained a loss of memory and that

Supreme Court, however, overruled the lower courts' decisions.⁷³ Justice Ginsburg, writing for the majority, held that the lower courts erred "in failing to recognize that the copyright statute of limitations...itself takes account of delay... a successful plaintiff can gain retrospective relief only three years back from the time of suit [with n]o recovery...for infringement in earlier years."⁷⁴

[21] The majority also held that laches are merely an equitable defense available in order to "fill a legislative hole" when federal causes of action lacked a statute of limitations.⁷⁵ Since Congress provided a statute of limitations for copyright infringement in the 1957 Act, the majority found that Congress had already "filled the legislative hole."⁷⁶ The majority continued, emphasizing that "laches is a defense developed by courts of equity; its principal application was, and remains to claims of an equitable cast for which the Legislature has provided no fixed time limitation."⁷⁷

“[T]he true cause of [plaintiff’s] delay...was, as [plaintiff] admits, that “the film hadn’t made money” [in years she deferred suit].”)

⁷³ See *Petrella*, 572 U.S. at 677.

⁷⁴ *Id.* (alterations in original) (“Moreover, if infringement within the three-year look-back period is shown, the Act allows the defendant to prove and offset against profits made in that period ‘deductible expenses’ incurred in generating those profits.”).

⁷⁵ See *id.* at 669–70.

⁷⁶ *Id.* at 670 (citing Act of Sept. 7, 1957, Pub. L. No. 85-313, 71 Stat. 633, which later became Copyright Act of 1976, 17 U.S.C. § 507(b)).

⁷⁷ See *id.* at 678; see also *United States v. Mack*, 295 U.S. 480, 489 (1935) (“Laches within the term of the statute of limitations is no defense [to an action] at law.”); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n. 16 (1985) (“[A]pplication of the equitable defense of laches in an action at law would be novel indeed.”). But see *Petrella*, 572 U.S. at 697 (Breyer, J., dissenting) (pointing out that reliance upon *Oneida* is misguided, since this quoted section is from a footnote, “made in light of special policies related to [Native American] tribes, which the Court went on to discuss in the following sentences.”).

[22] These findings are misleading and short sighted, as illustrated by the dissent’s opinion written by Justice Breyer. The first major hole in the majority’s argument is that the majority does not believe there is a danger that evidence “needed or useful to defend against liability will be lost during a copyright owner’s inaction.”⁷⁸ The majority only imagines copyright cases where key evidence in litigation “will be the [copyright registration] certificate, the original work, and the allegedly infringing work.”⁷⁹ In these cases, “the adjudication will often turn on the factfinder’s direct comparison of the original and the infringing works, *i.e.*, on the factfinder’s ‘good eyes and common sense’ in comparing the two works’ ‘total concept and overall feel.’”⁸⁰ The majority uses one example of copyright infringement cases and uses it to define *all* copyright infringement cases; however “[c]ircumstances warranting the application of laches in the context of copyright claims are not difficult to imagine.”⁸¹ The most common case would involve questions of proper licensing, and Justice Breyer provides a realistic hypothetical example:

A 20-year delay in bringing suit could easily prove inequitable. Suppose, for example, the plaintiff has deliberately waited for the death of witnesses who might prove the existence of understandings about a license to reproduce the copyright work, or who might show that the plaintiff’s work was in fact derived from *older* copyrighted material that the defendant has licensed.⁸²

In fact, this hypothetical resembles the facts within the case. There was question about if the original copyright owner gave permission to defendant to make the movie, as well as questions regarding if the movie was based

⁷⁸ See *Petrella*, 572 U.S. at 683.

⁷⁹ See *id.* at 684.

⁸⁰ *Id.* (citation omitted).

⁸¹ *Id.* at 689 (Breyer, J., dissenting).

⁸² *Id.* (Breyer, J., dissenting).

off of the protected work or either of the two similar works in the public domain.⁸³ Because of the eighteen year delay, three key witnesses “died or became unavailable, making it more difficult for [the defendant] to prove that it did not infringe the petitioner’s copyright.”⁸⁴

[23] Long delays in bringing copyright claims are not imaginary. In fact, many examples in district and circuit courts illustrate plaintiffs having brought claims years after they accrued and where delay-related inequity resulted.⁸⁵ The glaring problem with the majority’s holding is that it determined that “a court cannot *ever* apply laches, irrespective of the length of the plaintiff’s delay, the amount of the harm that it caused, or the inequity of permitting the action to go forward.”⁸⁶ Although the delay is only

⁸³ *Id.* at 691 (Breyer, J., dissenting) (where defendant would not have infringed the copyright “either because the 1963 screenplay was in fact derived from a different book, the rights to which MGM owned under a nonchallenged license, or because MGM held a license to the screenplay under a 1976 agreement that it signed with Jake LaMotta, who coauthored the screenplay with the petitioner’s father.”).

⁸⁴ *See Petrella v. MGM*, 572 U.S. 663, 681 (2014) (Breyer, J., dissenting).

⁸⁵ *See, e.g., Ory v. McDonald*, 141 F. App’x 581, 583 (9th Cir. 2005) (involving a claim brought more than 30 years after an allegedly infringing song was released); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952–56 (9th Cir. 2001) (surrounding claim that seven James Bond films infringed a copyright to a screenplay, brought 19 to 36 years after the films were released, and where “many of the key figures in the creation of the James Bond movies ha[d] died” and “many of the relevant records [went] missing”); *Jackson v. Axton*, 25 F.3d 884, 889 (9th Cir. 1994), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (regarding claim of co-authorship of the song “Joy to the World,” brought 17 years after the plaintiff learned of his claim such that memories faded, the original paper containing the lyrics was lost, the recording studio (with its records) closed, and the defendant had “arranged his business affairs around the Song” for years); *Newsome v. Brown*, No. 01 Civ. 2807TPG, 2005 WL 627639, at *8–9 (S.D.N.Y. Mar. 16, 2005) (involving claim regarding the song “It’s a Man’s World,” brought 40 years after first accrual, where the plaintiff’s memory had faded and a key piece of evidence was destroyed by fire); *see also Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 230–31, 234–36 (6th Cir. 2007) (regarding claim that condominium design infringed plaintiff’s design, brought only 2.5 years (or so) after claim accrued but after condominium was built, apartments were sold, and 109 families had moved in).

⁸⁶ *Petrella*, 572 U.S. at 691–92 (Breyer, J., dissenting).

eighteen years in *Petrella*, the current copyright term is “the life of the author and 70 years after the author’s death.”⁸⁷ If an alleged infringement occurs more than 25 years before the author’s death, the length of the copyright would permit an over one hundred year delay from an alleged infringement before the author’s heir decides to initiate a lawsuit. This type of delay would affect any evidence that the allegedly infringer *lawfully* licensed their use since many documents may be lost and all the potential witness would likely have faded memories or be deceased. These “few and unusual cases where a plaintiff unreasonably delays in bringing suit and consequently causes inequitable harm to the defendant” are the very reason the doctrine of laches exists.⁸⁸

[24] The second problem presented in the majority’s argument is its position that the “copyright statute of limitations . . . itself takes account of delay,” by limiting the recovery to only the three years prior to filing the claim so that additional safeguards like laches are not needed.⁸⁹ First, this argument overlooks the remedy of statutory damages provided by the Copyright Act.⁹⁰ Second, it allows a plaintiff to choose to bring a suit only when profits begin to materialize, and then allow that plaintiff to “sue every three years thereafter until the copyright expires.”⁹¹ For example, a song or film that is unpopular upon its initial release may become a cult classic years later.⁹² In this situation, a copyright owner who knows about a potentially

⁸⁷ 17 U.S.C. § 302(a); *Petrella*, 572 U.S. at 674.

⁸⁸ See *Petrella*, 572 U.S. at 700 (Breyer, J., dissenting).

⁸⁹ *Id.* at 677.

⁹⁰ See generally 17 U.S.C. § 504(c) (outlining how, when, and how much a copyright owner may recover in statutory damages); see *Petrella*, 572 U.S. at 669.

⁹¹ *Petrella*, 572 U.S. at 692 (Breyer, J., dissenting).

⁹² See, e.g., *Truth Hurts*, SONGFACTS (Sep. 19, 2020), <https://www.songfacts.com/facts/lizzo/truth-hurts> [<https://perma.cc/X9CE-XLJY>] (Lizzo’s “Truth Hurts” was released in September of 2017, but did not see commercial success until 18 months later after being featured during a prominent scene in the 2019

infringing work may decline to bring an initial lawsuit, instead waiting for when the work becomes more profitable (and evidence of non-infringement has decayed).⁹³ By waiting, a potential plaintiff has positioned themselves in a higher leverage position for negotiating a settlement, since the alleged infringing work's creator would be incentivized to clear up any legal uncertainty about their newly profitable work. This uncertainty is better decided when the work is newly created when negotiating power is more equal.

[25] Third, the majority held that Congress eliminated the laches defense by creating a statute of limitations for copyright claims.⁹⁴ However, “[n]othing in the 1957 Act – or anywhere else in the text of the copyright statute – indicates that Congress also sought to bar the operation of laches.”⁹⁵ Congress only set out to enact a uniform statute of limitations for copyright claims so federal courts no longer had to borrow from state law that varied from state to state.⁹⁶ “The legislative history of § 507 shows that Congress chose not to ‘specifically enumerat[e] certain equitable considerations which might be advanced in connection with civil copyright actions,’ because it understood that ‘[f]ederal district courts, generally, recognize these equitable defenses anyway.’”⁹⁷ Courts prior to 1957 applied laches in federal copyright cases,⁹⁸ and Congress would have expected they would continue to do so. Justice Breyer also notes that the Supreme Court has “read laches into statutes of limitations otherwise silent on the topic of

Netflix rom-com film *Someone Great*, finally hitting number 1 on the charts in September of 2019, nearly two years later).

⁹³ See Ochoa & Wistrich, *supra* note 12, at 479–80.

⁹⁴ *Petrella*, 572 U.S. at 679.

⁹⁵ *Id.* at 693–94 (Breyer, J., dissenting).

⁹⁶ *Id.* at 693 (Breyer, J., dissenting).

⁹⁷ *Id.* at 694 (Breyer, J., dissenting) (citation omitted).

⁹⁸ *Id.* (Breyer, J., dissenting).

equitable doctrines in a multitude of contexts.”⁹⁹ “Unless Congress indicates otherwise, courts normally assume that equitable rules continue to operate alongside limitations periods, and that equity applies both to plaintiffs and to defendants.”¹⁰⁰

[26] Finally, the majority erred by holding that the defense of laches is not available in any action for damages. As Justice Breyer notes in his dissent, this is contrary to previous decisions by the Supreme Court.¹⁰¹ Even within federal copyright litigation, four of the six circuits that have considered the matter have held that laches can bar claims for legal relief.¹⁰² More obviously, the majority places “insufficient weight upon the rules and

⁹⁹ *Id.* (Breyer, J., dissenting).

¹⁰⁰ *Id.* at 695 (Breyer, J., dissenting) (citation omitted).

¹⁰¹ *See Petrella*, 572 U.S. at 697 (Breyer, J., dissenting); *See, e.g.*, *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116–122 (2002) (laches available in hostile work environment claims seeking damages under Title VII); *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 205 (1997) (laches available in actions for “withdrawal liability assessment[s]” under the MPPAA).

¹⁰² *Petrella v. MGM, Inc.*, 695 F. 3d 946, 956 (9th Cir. 2012) (lower court decision of *Petrella*, barring all copyright claims due to laches); *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enterprises, Int’l*, 533 F. 3d 1287, 1319–22 (11th Cir. 2008) (laches can bar copyright claims for retrospective damages); *Chirco v. Crosswinds Communities, Inc.*, 474 F. 3d 227, 234–36 (“laches can be argued ‘regardless of whether the suit is at law or in equity,’ and holding that while the plaintiffs could obtain damages and an injunction, their request for additional equitable relief “smack[ed] of the inequity against which Judge Hand cautioned in *Haas* and which the judicial system should abhor” (quoting *Teamsters*, 283 F.3d at 881)); *Jacobsen v. Deseret book Co.*, 287 F. 3d 936, 950–51 (10th Cir. 2002) (laches available in “rare cases” and failing to draw a distinction in the type of remedy sought) (citation omitted); *But see New Era Publications Int’l v. Henry Holt & Co.*, 873 F.2d 576, 584–85 (2d Cir. 1989) (laches can bar claims for injunctive relief, but not damages, under the Copyright Act); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798–99 (4th Cir. 2001) (laches unavailable in copyright cases altogether).

practice of modern litigation.”¹⁰³ In 1938, Congress and the Federal Rules of Civil Procedure replaced what would have once have been actions “at law” and actions “in equity” with simply the “civil action.”¹⁰⁴ A federal civil action is subject to both equitable and legal defenses.¹⁰⁵ The majority instead attempts to keep equitable and legal defenses separate,¹⁰⁶ as if the federal courts are still split in dealing with actions “at law” and actions “in equity.”

[27] These shortcomings in the majority’s opinion eliminated the laches defense that could have remedied any perverse incentives created by previous case law on copyright infringement’s statute of limitations.¹⁰⁷ Instead, the absence of the laches defense creates incentives for plaintiffs to sit on their claims until their claims are profitable or evidence favorable to the defendant is lost.¹⁰⁸ These problems are only magnified when copyright infringement takes place online.

III. COPYRIGHT INFRINGEMENT ON THE INTERNET

[28] The internet and copyright infringement are no strangers to each other. In fact, a high volume of pirated copyrighted works are present across the internet.¹⁰⁹ However, the case law involving the statute of limitations of

¹⁰³ *Petrella*, 572 U.S. at 699 (Breyer, J., dissenting).

¹⁰⁴ FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

¹⁰⁵ *See* FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: . . . estoppel . . . laches . . . [and] statute of limitations . . .”).

¹⁰⁶ *See Petrella*, 572 U.S. at 678.

¹⁰⁷ *See id.* at 689–90 (Breyer, J. dissenting).

¹⁰⁸ *See id.*

¹⁰⁹ *See* Ryan Faughnder, *Music Piracy is Down but Still Very Much in Play*, LOS ANGELES TIMES (June 28, 2015 7:17 PM), <https://www.latimes.com/business/la-et-ct->

alleged copyright infringements has developed in large part outside of cases involving online activity.¹¹⁰ This has allowed the case law to evolve without considering the implications of a widely used technology for disseminating content,¹¹¹ creating opportunities in copyright law for impractical results and perverse incentives.¹¹²

A. *APL Microscopic, LLC v. United States*

[29] The issue of statute of limitations for potentially infringing content on the internet was finally addressed in a recent case in the United States Court of Federal Claims.¹¹³ In the case, APL Microscopic, LLC (“APL”) filed a complaint on December 3, 2018 against the United States.¹¹⁴ The complaint alleged that that the United States, through the National Aeronautics and Space Administration (“NASA”), infringed on APL’s rights under the Copyright Act by posting APL’s copyrighted photograph on a webpage within NASA’s website in 2004.¹¹⁵ APL at first sought \$150,000 in statutory damages, actual damages, and injunctive relief.¹¹⁶

state-of-stealing-music-20150620-story.html [https://perma.cc/BU8J-89FQ] (“About a fifth of Internet users around the world continue to regularly access sites offering copyright infringing music”).

¹¹⁰ See, e.g., *Petrella*, 572 U.S. at 663.

¹¹¹ See *id.*

¹¹² See generally *id.* at 689–90 (Breyer, J. dissenting) (demonstrating an example of perverse incentives in copyright cases).

¹¹³ *APL Microscopic v. United States*, 144 Fed. Cl. 489 (2019).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 491 (specifically, APL alleged that NASA infringed upon its exclusive rights to reproduce, distribute, and display their photograph).

¹¹⁶ See *APL Microscopic, LLC*, 144 Fed.Cl. at 491 (2019).

Later, APL amended its complaint to seek only actual damages measured by “the fair market value of the licensing fees the owner was entitled to charge for the use of the copyrighted work.”¹¹⁷ Defendant NASA filed a motion to dismiss for failure to state a claim, primarily relying upon a statute of limitations defense.¹¹⁸

[30] After Court orders, the parties briefed issues regarding when copyright infringements of certain exclusive rights occur.¹¹⁹

[31] The first issue concerned public display, specifically: “whether public display occurs when the owner of a website puts a protected work on its server (without authorization) so that it is made available for viewing by individual computer users who access the relevant page on the website,” or “when—and each time—an individual computer user accesses the relevant page on the website.”¹²⁰

[32] The second issue concerned the right of distribution:

Does a public distribution occur when the owner of a website uploads a protected work on its server (without authorization) so that it is made available for viewing and *downloading* by individual computer users who access the relevant page on the website, or, does a distribution occur when— and each time—an individual computer user accesses the relevant page on the website?¹²¹

¹¹⁷ *Id.* (internal punctuation omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *APL Microscopic, LLC*, 144 Fed.CL at 491 (2019).

With briefs issued by both parties, the United States Court of Federal Claims analyzed whether any infringement of APL's copyright interests occurred within the three years prior to APL filing the claim.¹²²

1. Reproduction Right

[33] One of the rights APL alleged NASA violated was their reproduction right. The Copyright Act grants to copyright owners the exclusive right "to reproduce the copyrighted work in copies or phonorecords."¹²³ The term "copies" is defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicate, either directly or with the aid of a machine or device."¹²⁴ A work is considered "fixed" in a tangible medium of expression "when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹²⁵

[34] For content online, the copyrighted material is "fixed" when it is "embodied . . . in a computer's server," and that file stored in the computer is considered a copy of the work for the purposes of copyright law.¹²⁶ Online content is not considered to be "separate reproductions" or repeated

¹²² *Id.*

¹²³ 17 U.S.C. § 106(1) (2009).

¹²⁴ 17 U.S.C. § 101 (2011).

¹²⁵ *Id.*

¹²⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007); *See also Capitol Records, LLC v. ReDigi, Inc.*, 934 F.Supp.2d 640, 649 (S.D.N.Y. 2013) ("the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object").

infringement of the right of reproduction.¹²⁷ Instead, “the fixing of the digital file in [a] server . . . creates a new phonorecord, which is a reproduction.”¹²⁸ Courts view this as a singular and distinct act, and the fact “[t]hat the website could be viewed—i.e. ‘perceived’—by different users at different times, or even simultaneously, does not mean that [the defendant] created separate copies of the Work to facilitate such display.”¹²⁹

[35] Since APL’s infringement claim regarding its right of reproduction was filed over three years from when NASA originally uploaded the Work to its servers, the court found the claim was barred by the statute of limitations.¹³⁰ With respects to the right to reproduce a work, the statute of limitations fulfilled its purpose, to prevent a copyright owner from filing an untimely claim over three years after a party’s alleged infringing act.¹³¹

2. Distribution Right

[36] Another right the Copyright Act grants copyright owners is the exclusive right “to distribute copies or phonorecords of the copyrighted

¹²⁷ See Steven Foley, *Buffering and the Reproduction Right: When is a Copy a Copy?*, 1 CYBARIS 99, 104 (2010).

¹²⁸ *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 657 (2d Cir. 2018); see also *Flava Works Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (“The infringer is the customer . . . who copied [Plaintiff’s] copyrighted video by uploading it to the Internet.”).

¹²⁹ *APL Microscopic, LLC v. United States*, 144 Fed.Cl. 489, 495–96 (2019); see also 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.20 (2020) (“[T]he transmission of the . . . printed version of [literary, musical, and dramatic works] so that they may be read by electronic means . . . does not implicate the reproduction right.”).

¹³⁰ *APL Microscopic*, 144 Fed. Cl. at 496 (“Therefore, although the Court agrees that the Government infringed on APL’s right ‘to reproduce the copyrighted work’ in 2004 when NASA uploaded the photograph to its server, there were no additional reproductions of the Work through NASA’s subsequent distribution or display that would bring APL’s right of reproduction claim within the statute of limitations period.”).

¹³¹ See *id.* at 493–94.

work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹³²

[37] The term “distribute” is not defined in the Copyright Act, so “[courts] must determine when a “distribution” occurs.”¹³³ This has led to debate and disagreements amongst different courts and legal scholars around if the distribution right is infringed upon when the work is “made available” or only with proof of “actual dissemination.”¹³⁴ Although many different legal scholars and federal courts have weighed in on the issue, the Court in *APL Microscopic* refused to conduct a thorough analysis of the split authorities, instead relying solely on a district court decision.¹³⁵ The Court completely discredited the “make available” decisions by interpreting their holdings as only selectively relevant in cases where it is impossible for the copyright owner to prove actual distribution.¹³⁶ As a result, the court rejected the defendant’s argument that the right of distribution “is implicated when copies of a work are made available to the public (e.g. placed on the server and available for download via the website) and does not depend on whether members of the public have accessed the

¹³² 17 U.S.C.A. § 106(3) (2018).

¹³³ See *APL Microscopic*, 144 Fed. Cl. at 496.

¹³⁴ See, e.g., *NIMMER & NIMMER*, supra note 129, § 8.11(C)(1)(a) (“[I]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.”), § 8.11[D][4][c] (“[T]he distribution right was formulated precisely so that it would extend to making copyrighted works available, rather than mandating proof of actual activities of distribution.”).

¹³⁵ See *APL Microscopic*, 144 Fed. Cl. at 496 (citing *BMG Rights Mgmt. (US) LLC v. Cox Comms., Inc.*, 149 F. Supp. 3d 634, 670 (E.D. Va. 2015), *rev’d in part*, 881 F. 3d 293 (4th Cir. 2018)).

¹³⁶ *APL Microscopic*, 144 Fed. Cl. at 497 (“[The “make available” decisions do] not announce a rule of general applicability, but instead articulated a principle that applies only in cases where it is impossible for a copyright owner to produce proof of actual distribution.”) (quoting *BMG*, 149 F. Supp. 3d at 666).

distribution. Instead, the court accepted the plaintiff's argument that its distribution right is violated "each and every time a computer user accesses the defendant's website displaying the protected work."¹³⁷

[38] The *APL Microscopic* court's analysis is disingenuous. There is a clear circuit split on the issue of "making available," with several circuits having recognized a "make available" theory in the context of copyright distribution.¹³⁸ Even district courts within the First Circuit have disagreed on the "make available" theory of distribution.¹³⁹

[39] Furthermore, since the circuit split occurred, legal scholars have changed their position on the issue, now supporting "making available" equals "distribution."¹⁴⁰ The most cited treatise in copyright law, *Nimmer on Copyright*, took the position prior to 2011 that actual dissemination of copies of the work to the public is necessary in order to infringe the distribution right.¹⁴¹ After further analysis of the legislative history,

¹³⁷ *Id.* at 496.

¹³⁸ See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F. 3d 199, 203 (4th Cir. 1997); *Motown Record Co., LP, et al. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. Lexis 11626, at *11 (E.D. Pa. Feb. 30, 2007) (holding that "[a] plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant "made available" the copyrighted work"); *Arista Records LLC v. Greubel*, 453 F. Supp.2d 961, 969 (N.D. Tex. 2006) (accepting the "make available" theory). *But see Nat'l Car Rental Sys. v. Computer Assocs. Int'l*, 991 F. 2d 426, 430 (8th Cir. 1993) (rejecting the "make available" theory); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008) (rejecting "make available" theory).

¹³⁹ Compare *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (rejecting the "make available" theory), with *Universal Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 191 (D. Me. 2006) (finding that "making available" violated the distribution right).

¹⁴⁰ Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 29–32 (2011).

¹⁴¹ NIMMER & NIMMER, *supra* note 129, § 8.11, at 18 ("Infringement of [the distribution

however, Nimmer amended his latest treatise in 2011 stating that “the distribution right was formulated precisely so that it would extend to making copyrighted works available, rather than mandating proof of actual activities of distribution.”¹⁴² Law professor Peter S. Menell explained by going further back into the legislative history of the 1976 Copyright Act that Congress actually intended the “distribution” right to replace the exclusive rights to “vend” and to “publish,” which include the right to “make available.”¹⁴³

[40] A “make available” theory would be consistent with the United States’ international treaty obligations. The United States is a party to the World Intellectual Property Organization Copyright Treaty, which recognizes a “make available” right for copyright owners.¹⁴⁴ Also, the World Intellectual Property Organization Performances and Phonograms Treaty, which the United States is also a party to, recognizes a similar “make available” right.¹⁴⁵ Neither one of these are dependent on proof that copies were actually transferred to particular individuals.¹⁴⁶ The United States has also entered into several Free Trade Agreements that also provide a “make available” right.¹⁴⁷ By ratifying these treaties, “the legislative and executive

right] requires an actual dissemination of either copies or phonorecords.”).

¹⁴² *Id.* at 45.

¹⁴³ Menell, *supra* note 140, at 29–32; *see also* Mark Marciszewski, *When is There Distribution? Revisiting the Interpretation of “Distribute” in Copyright Infringement within Peer-to-Peer File Sharing Networks*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 423, 438–43 (2019).

¹⁴⁴ World Intellectual Property Organization (WIPO) Copyright Treaty art. 6(1), art. 8 (Mar. 6, 2002) [hereinafter WCT].

¹⁴⁵ World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty art. 12(1), art. 14 (May 20, 2002) [hereinafter WPPT].

¹⁴⁶ WCT *supra* note 144, at art. 6(1), art. 8; *id.* at art. 12(1), art. 14.

¹⁴⁷ *See, e.g.*, Free Trade Agreement, U.S.-Austl., art. 17.5 (May 18, 2004),

branches indicated that U.S. law complied with the treaties by protecting that making-available right.”¹⁴⁸

[41] Other federal statutes regarding “distribution” have also included “make available” language.¹⁴⁹ Even those statutes that do not explicitly define “distribute” have been interpreted by federal courts to include “make available” in the definition of “distribute.”¹⁵⁰ Even the United States Copyright Office’s Register of Copyrights “opined to Congress that making a copyrighted work available violates the distribution right.”¹⁵¹

3. Display Right

[42] Another exclusive right granted by the Copyright Act is the right to “display the copyrighted work publicly.”¹⁵² “To “display” a work means to show a copy of it, either directly or by means of a film, slide, television

https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf [<https://perma.cc/2R8Q-C8AN>].

¹⁴⁸ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008).

¹⁴⁹ See, e.g., 17 U.S.C. § 901(a)(4) (“to ‘distribute’ means to sell, or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail, or otherwise transfer”); 17 U.S.C. § 506(a)(1)(C) (“the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public”); 17 U.S.C. § 1101(a)(3) (quoting the “bootleg statute,” which among its prohibited acts includes someone who “distributes or offers to distribute, sells or offers to sell”).

¹⁵⁰ United States v. Richardson, 713 F. 3d 232, 236 (5th Cir. 2013) (“downloading images and videos containing child pornography from a peer-to-peer computer network and storing them in a shared folder accessible to other users on the network amounts to distribution under § 2252A(a)(2)(B)”).

¹⁵¹ Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1217 (D. Minn. 2008).

¹⁵² 17 U.S.C. § 106(5).

image, or any other device or process”¹⁵³ With regard to the meaning of “publicly,” the Copyright Act provides, in relevant part, that:

[t]o perform or display a work ‘publicly’ means - -

...

(2) to transmit or otherwise communicate a performance or display of the work...to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹⁵⁴

In *APL Microscopic*, the defendant argued that “the right of public display is implicated when the work is placed on display for viewing by the public (e.g., placed on the server and accessible via the website) and does not depend on whether members of the public have in fact viewed the work (e.g., by accessing the page).”¹⁵⁵ However, the court agreed with the plaintiff’s articulation that “[p]ublic display occurs, and § 106(5) is violated, each time an individual computer user accesses the relevant page on a website that displays the protected work.”¹⁵⁶ The court relied primarily

¹⁵³ 17 U.S.C. § 101.

¹⁵⁴ *Id.*

¹⁵⁵ *APL Microscopic v. United States*, 144 Fed. Cl. 489, 498 (2019).

¹⁵⁶ *Id.* (noting that the three cases plaintiff relied upon for this assertion are not controlling law (*Greenberg v. Nat’l Geographic Society*, 533 F.3d 1244 (11th Cir. 2008) (quoted language actually comes from the dissenting opinion of the case); *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) (opinion was withdrawn and superseded); *Flava works, Inc. v. Gunter*, 2011 WL 3876910 (N.D. Ill. 2011) (case was vacated)).).

upon *Perfect 10, Inc. v. Amazon.com, Inc.*¹⁵⁷ and *Playboy Enterprises, Inc. v. Webworld, Inc.*¹⁵⁸

[43] The Ninth Circuit in *Perfect 10* held that “based on the plain language of [17 U.S.C. §101], a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory.”¹⁵⁹ This language of “a person,” however, is ambiguous as to who is actually violating the display right. To further this confusion, the court in *APL Microscopic* used the passive voice to hold that “each time a user viewed NASA’s webpage, APL’s copyrighted Work was displayed on the user’s computer.”¹⁶⁰ Again, it is ambiguous as to who is violating the copyright holder’s right of display—the user or the content creator.

[44] The conundrum continues when considering that the statute of limitations only runs from the “last infringing act.”¹⁶¹ Black Law’s dictionary defines “act” as “something done or performed, especially voluntary.”¹⁶² It is reasonable to view an alleged online infringer’s last “act” as when they originally posted the alleged infringing materials online. At

¹⁵⁷ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F. 3d 1146 (9th Cir. 2007).

¹⁵⁸ See *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997) (explaining that defendants owned or operated a website that offered copyrighted photographs and images to subscribers for a monthly fee).

¹⁵⁹ *Perfect 10*, 508 F. 3d at 1160 (emphasis added).

¹⁶⁰ *APL Microscopic*, 144 Fed. Cl. at 499.

¹⁶¹ *United States v. Shabazz*, 724 F.2d 1536, 1540 (11th Cir. 1984).

¹⁶² *Act*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Act*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/act> (last visited Sep. 21, 2020) (“the doing of a thing; law: something done voluntarily”).

that point, they had taken “all the steps necessary”¹⁶³ in order to complete their infringing acts. From that point, the content uploaded takes no more affirmative actions to disseminate their content.¹⁶⁴

4. Conclusion

[45] The *APL Microscopic* court held that the statute of limitations period for a violation of the right of distribution “began again every time [the] photograph was viewed on [defendant’s] website . . . and each viewing of [the] photograph on [defendant’s] web page constituted a separate infringement on the owner’s right of public display.”¹⁶⁵ As a result, the court dismissed the defendant’s motion to dismiss on grounds of statute of limitations, holding that the plaintiff’s allegations regarding the infringement “contain[ed] sufficient factual matter to state a plausible claim” that infringement occurred during the past three years since the part of the defendant’s webpage with the protected photograph was still available.¹⁶⁶

[46] With this interpretation that the statute of limitations period restarts every time the website is viewed, there are only two practical ways for the statute of limitations to expire: (1) three years after the copyright of the

¹⁶³ See, e.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F. 3d 199, 203 (4th Cir. 1997) (“[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”).

¹⁶⁴ Cf. *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997) (where defendant content uploader continued to charge monthly fees for subscribers to gain access to their infringing content, the court found that the defendant was repeatedly “displaying” the work).

¹⁶⁵ *APL Microscopic*, 144 Fed. Cl. at 489.

¹⁶⁶ *Id.* at 499.

original material expires,¹⁶⁷ or (2) the alleged infringer must take affirmative actions to take down the allegedly infringing material from their website.¹⁶⁸

B. Statutory Damages

[47] The court in *APL Microscopic* concluded its opinion by reminding the parties “that APL may still elect for statutory damages.”¹⁶⁹ The issue of statutory damages has not been argued, and as a result not been considered, before any court in the context of statute of limitations. The 1976 Copyright Act provides an array of different remedies,¹⁷⁰ and one that plaintiffs can request is statutory damages. The Act states that:

...the copyright owner may elect, at any time before final judgement is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work...in a sum of not less than \$750 or more than \$30,000 as the court considers just...¹⁷¹

¹⁶⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (explaining that there can only be infringement of a valid copyright) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); see also 17 U.S.C. § 302 (stating that copyright protection lasts for a limited time).

¹⁶⁸ See, e.g., Tricia Levasseur, *Here’s How I Suspended a Website and Stopped Digital Copyright Infringement*, MEDIUM (Jun. 20, 2018), <https://medium.com/@cambridgetricia/this-website-is-republishing-medium-articles-without-permission-416fe8f786a3> [https://perma.cc/5NWN-CQ4L].

¹⁶⁹ See *APL Microscopic*, 144 Fed. Cl. at 499.

¹⁷⁰ See 17 U.S.C. § 504 (2010).

¹⁷¹ 17 U.S.C. § 504 (c)(1) (2010).

These statutory damages could increase “to a sum of not more than \$150,000” for cases of willful infringement or decrease “to a sum of not less than \$200” for cases of innocent infringement.¹⁷² There are two narrow exceptions involving nonprofit organizations for when a court would remit a request for statutory damages.¹⁷³ Outside of these exceptions, a claimant must only register their copyright in a timely manner in order to receive statutory damages.¹⁷⁴

[48] Statutory damages are available to any claimant that has received copyright registration before an infringement occurs.¹⁷⁵ For infringements taking place after the first publication of the work, registration must be “made within three months after the first publication of the work.”¹⁷⁶ Statutory damages are rewarded within the same range, without regard to how much the alleged infringer gained or the copyright owner lost, or more importantly, without regard to *when* an economic loss or gain occurs.¹⁷⁷

¹⁷² 17 U.S.C. § 504 (c)(2) (2010).

¹⁷³ *Id.* (“The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.”).

¹⁷⁴ 17 U.S.C. § 412 (2008).

¹⁷⁵ *See* 17 U.S.C. § 412(1).

¹⁷⁶ 17 U.S.C. § 412(2).

¹⁷⁷ *See* 17 U.S.C. § 504(c)(1).

[49] The issue that statutory damages presents is that it does not differentiate between an infringer who has successfully profited from their infringement and an infringer who has not profited from their infringement. It does not differentiate the number of occurrences of infringement nor the length of time of the infringing activity, only the amount of *copyrighted works* that are infringed.¹⁷⁸ This undermines the distinctions courts make between “continuing” and “separate accrual” interpretations of the statute of limitations, since the recovery amount for the entire collection of ongoing infringing actions would be the same as the recovery for just the last sole infringing act.¹⁷⁹ Statutory damages also undermine the Supreme Court’s reasoning in *Petrella*—that the Copyright Act’s statute of limitations already properly limit recovery due to delay.¹⁸⁰

[50] These concerns are especially relevant for copyright infringement on the internet. Often, infringing materials online do not gross high profits, and even if it is monetized, the profits are hard to determine and calculate.¹⁸¹ As a result, many plaintiffs that file claims may request statutory damages where their copyrighted content is infringed online, where actual damages may be difficult to determine. Since the statutory damages will be within the same range no matter when the lawsuit is brought,¹⁸² there is no

¹⁷⁸ *Id.* § 504(c)(1) (“with respect to any one work”).

¹⁷⁹ *See id.* (statutory damages calculated “with respect to any one work,” not by the number of times a work is infringed).

¹⁸⁰ *Petrella v. MGM, Inc.*, 572 U.S. 663, 667 (2014).

¹⁸¹ *What are Statutory Damages and Why Do They Matter?*, COPYRIGHT ALLIANCE: COPYRIGHT REGISTRATION FAQs (2020), https://copyrightalliance.org/ca_faq_post/statutory-damages-why-do-they-matter/ [<https://perma.cc/5M2U-XEZ6>].

¹⁸² *See Broadcast Music, Inc. v. Evie’s Tavern Ellenton, Inc.*, 772 F. 3d 1254, 1261 (11th Cir. 2014) (explaining that a longer practice of infringement may cause an increase in the amount of statutory damages by suggesting evidence of the “infringers’ blameworthiness”).

incentive for a plaintiff to bring a claim quickly. In fact, there is more incentive for a plaintiff to delay bringing a claim. Once a potential plaintiff has documented the evidence of the alleged infringement, they have three years in order to file suit. However, each time the plaintiff is able to return to the online infringing material, the three year statute of limitations will restart again.¹⁸³ Since the recovery will be the same, and they will already have the requisite evidence to show a prima facie case of infringement, potential plaintiffs will be incentivized to delay bringing suit in cases where evidence beneficial to the potential defendant would possibly go stale.

[51] This is not a problem unique to statutory damages either. For monetary relief tied exclusively to lost licensing compensation, a plaintiff whose ordinary licenses are in perpetuity would recover the same amount regardless of when a claim is filed. This will create the same perverse incentives as statutory damages since the statute of limitations will have no effect on limiting the potential recovery.

IV. SOLUTIONS

[52] Courts need to reevaluate their position on the “separate accrual” rule for cases involving the statute of limitations for copyright infringement on the internet. Specifically, courts can seek guidance from other closely related areas of law that have already remedied the issues created by posting content on the internet.¹⁸⁴ Libel, for example, is another civil tort action that occurs both in print and on internet platforms.¹⁸⁵ The case law surrounding

¹⁸³ See *Luar Music Corp. v. Universal Music Grp., Inc.*, 847 F. Supp. 2d 299, 306–07 (D.P.R. 2012).

¹⁸⁴ See generally *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (likening copyrighted works to patented articles when applying antitrust law to block booking of copyrighted works and noting previous decision applying antitrust law to patented articles).

¹⁸⁵ See *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007); *Van Buskirk v. N.Y. Times Co.*, 2000 U.S. Dist. LEXIS 12150, at *4–5 (S.D.N.Y. Aug. 24, 2000).

libel outlines a “single publication” rule for interpreting its statute of limitations.¹⁸⁶ This rule can be adopted for alleged online copyright infringement without harming the interests of potential plaintiffs.¹⁸⁷

A. Single Publication Rule

[53] The “single publication” rule has been widely adopted in the majority of states for libel claims.¹⁸⁸ The “single publication” rule is generally defined as “for any single edition of a [published material], there [is] but a single potential action for a defamatory statement contained in the [material], no matter how many copies of the [material] were distributed.”¹⁸⁹ The purpose of this rule is to prevent plaintiffs from bringing stale and repetitive defamation claims against publishers.¹⁹⁰

[54] As a result of the “single publication” rule, the cause of action for libel or defamation accrues upon the first general distribution of the publication to the public.¹⁹¹ For example, “retail sales of individual copies

¹⁸⁶ See, e.g., *Haberman v. Hustler Mag. Inc.*, 626 F. Supp. 201, 216 (D. Mass. 1986); *Shively v. Bozanich*, 80 P.3d 676, 684 (Cal. 2003); *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45, 47 (N.Y. 1948); *Williamson v. New York Times, Inc.*, 980 S.W.2d 706, 710 (Tex. App. 1998); Cal Civ Code §3425.3 (Deering 2020).

¹⁸⁷ See *infra* Section IV(b).

¹⁸⁸ See, e.g., *Haberman v. Hustler Mag., Inc.*, 626 F. Supp. 201, 216 (D. Mass. 1986); *Shively v. Bozanich*, 80 P.3d 676, 685 (Cal. 2003); *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45, 47 (N.Y. 1948); *Williamson v. New York Times, Inc.*, 980 S.W.2d 706, 710 (Tex. App. 1998); Cal Civ Code §3425.3 (Deering 2020).

¹⁸⁹ *Shively*, 80 P.3d at 684.

¹⁹⁰ *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137,142 (5th Cir. 2007) (citing *Holloway v. Butler*, 662 S.W.2d 668, 691 (Tex. App. 1983)).

¹⁹¹ See *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007); see also *Haberman v. Hustler Mag., Inc.*, 626 F. Supp. 201, 216 (D. Mass. 1986) (holding that under the single publication rule, the limitations period is measured from the date upon which the work was first made widely available to the public); *Suss v. New York Media*,

after the publication date and sales of back issues do not trigger a new limitations period . . . [h]owever, separate printings of the original content are considered subsequent publications.¹⁹² Only when a party “republishes” a defamatory statement does a new cause of action accrue. For example, in *Lehman v. Discovery Communications, Inc.*,¹⁹³ the rebroadcast in May 2001 of a March 1999 television program was held to be a republication that restarted the statute of limitations.¹⁹⁴ However, when a new republication of a defamatory statement occurs, the new cause of action can only be brought against the party that republished the statement and not against the party that originally published the statement.¹⁹⁵

[55] The state courts that apply a “single publication” rule have already faced the unique legal questions that posting content on the internet presents when faced with deciding claims of libel or defamation occurring online. In these cases, the courts have held that the “single publication” rule applies to

Inc., 891 N.Y.S.2d 409, 410 (1st Dep’t 2010) (explaining that statute of limitations begins to run when magazines are distributed to newsstands for sale); *Rothlein v. W.W. Norton & Co.*, 712 N.Y.S.2d 279, 282 (Sup. Ct. N.Y. Cnty. 2000) (explaining that statute of limitations begins to run when books are shipped to stores); *Moyal v. New York Mag.*, 27 Media L. Rep. 2019 (Sup. Ct. N.Y. Cnty. 1999); *Stella v. James J. Farley Ass’n*, 122 N.Y.S.2d 322, 330 (Sup. Ct. N.Y. Cnty. 1953), *aff’d*, 135 N.Y.S.2d 234 (1st Dep’t 1954) (explaining that for statute of limitations purposes, publication takes place when the libel is effectively placed within the reach of the ultimate buying public).

¹⁹² *Nationwide Bi-Weekly*, 512 F.3d at 142; *see also* *Stephan v. Baylor Med. Ctr. at Garland*, 20 S.W.3d 880, 889 (Tex. App. 2000) (reasoning that in the case of separate printings “it is apparent that the publisher intends to reach different audiences and this intention justifies a new cause of action”).

¹⁹³ *Lehman v. Discovery Commc’n, Inc.*, 332 F. Supp. 2d 534, 539 (E.D.N.Y. 2004).

¹⁹⁴ *Id.*

¹⁹⁵ *Vondra v. Crown Publ’g Co.*, 15 Mass. L. Rep. 272, at *4 (Mass. Super. 2002); *see also* *Lehman v. Fox Cable Networks Inc.*, 38 Media L. Rep. 1284, 2009 WL 2707391, at *5 (E.D.N.Y. 2009) (rebroadcasting by new owner of rights to program does not constitute republication by former owner).

Internet publications.¹⁹⁶ The “single publication” rule even applies if a website operates on a continual basis.¹⁹⁷ The courts have held that accessing an article on the internet after its initial publication does not restart the limitations period.¹⁹⁸ For example, in the Ninth Circuit decision *Yeager v. Bowlin*,¹⁹⁹ the Court decided a right-of-publicity case by holding that multiple additions to and revisions of website content *other* than that complained of by the plaintiff did not constitute republication.²⁰⁰ The Court affirmed that “under California law, a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience.”²⁰¹ This is a stark contrast from the interpretation of copyright law’s statute of limitations in *APL Microscopic*, where NASA was found to be continually infringing APL

¹⁹⁶ *Van Buskirk v. N.Y. Times Co.*, 28 Media L. Rep. 2525, at *2 (S.D.N.Y. 2000); *Firth v. State*, 706 N.Y.S. 2d 835, 115 (N.Y. Ct. Cl. 2000), *aff’d*, 731 N.Y.S.2d 244, 248 (N.Y. App. Div. 2001), *aff’d*, 98 N.Y.2d 365, 372 (N.Y. 2002); *Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375, 378 (Sup. Ct. N.Y. Cnty. 2006) (holding a comment posted on private, subscriber-only website subject to single publication rule); *Abate v. Maine Antique Digest and Mainstreet Commc’n, Inc.*, 17 Mass. L. Rep. 288, at *1 (Mass. Super. 2004) (holding an internet posting was barred by the statute of limitations due to the single publication rule).

¹⁹⁷ *Traditional Cat Ass’n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 358 (Cal. 2004); *see also Roberts v. McAfee*, 660 F. 3d 1156, 1167–69 (9th Cir. 2011) (holding a company merely continued to host an allegedly defamatory press release on its website, without altering or reissuing the release, did not republish and the date the release was first posted on the site controlled for limitations purposes).

¹⁹⁸ *See Young v. Suffolk County*, 705 F. Supp. 2d 183, 211 (E.D.N.Y. 2010); *Reilly v. Garden City Union Free Sch. Dist.*, 2009 N.Y. Misc. LEXIS 5618, at *8–9 (Sup. Ct. Nassau Cnty. Dec. 1, 2009); *Manfredonia v. Weiss*, 2005 N.Y. Misc. LEXIS 8565, at *9, 11 (Sup. Ct. N.Y. Cnty. Dec. 5, 2005).

¹⁹⁹ *Yeager v. Bowlin*, 693 F.3d 1076, 1083 (9th Cir. 2012).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1082.

Microscopic's copyright even though NASA added no new information, made no substantial alteration, and did not direct its content to a new audience.²⁰²

[56] One difference between the “single publication rule” and current copyright cases, is that many of the libel law decisions using the “single publication rule” weigh the considerations of how content on the internet is uniquely displayed and distributed.²⁰³ For example, New York courts have held that hyperlinking to an online article does not constitute a republication of the linked article.²⁰⁴ In the same way, the manual restoration of an article to a newspaper's website after it had become temporarily unavailable for technical reasons was held to not be a republication, because the restoration was “akin to a delayed circulation of the original.”²⁰⁵ In addition, neither a single modification of an internet website²⁰⁶ nor a posting of new discussion threads in the “comments” section of an online article²⁰⁷ are considered a republication by New York courts.

[57] Some actions with online content, however, do constitute a separate publication. For example, an online publication of a newspaper is considered a separate publication from the print edition because it is

²⁰²See *APL Microscopic v. United States*, 144 Fed. Cl. 489, 498 (2019).

²⁰³ See, e.g., *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 268 (S.D.N.Y. 2013).

²⁰⁴ See *Penaherrera v. N.Y. Times Co.*, 2013 N.Y. Misc. LEXIS 7148, at *17 (Sup. Ct. N.Y. Cnty. Aug. 6, 2013); *Haefner v. New York Media, L.L.C.*, 2009 N.Y. Misc. LEXIS 3641, at ***13 (Sup. Ct. N.Y. Cnty. Oct. 15, 2009).

²⁰⁵ See *Martin v. Daily News, L.P.*, 121 A.D.3d 90, 104 (N.Y. 2014).

²⁰⁶ See *Admissions Consultants, Inc. v. Google, Inc.*, 2008 NYLJ LEXIS 6373, at *6–7 (Sup. Ct. N.Y. Dec. 8, 2008) (holding that an addition of a “bump message” does not constitute a republication of the content).

²⁰⁷ See *Biro*, 963 F. Supp. 2d at 268.

designed to reach a different audience.²⁰⁸ Where simply hyperlinking to an online article does not constitute a republication,²⁰⁹ an online post that restates an earlier allegedly defamatory post, *in addition to* providing a hyperlink, constitutes a republication of the earlier post.²¹⁰ In a similar fashion, posting a modified version of an earlier post can create a republication.²¹¹

[58] State and federal courts have been able to make these distinctions between what does and what does not constitute publication or republication on the internet. The distinctions also appear to be intuitive: new comments on a discussion thread does not create a new publication²¹² but a new editorial note on the original article *does* create a republication.²¹³ These types of distinctions can be used in copyright law. Each publication in libel law is similar to each distinct infringing acts in copyright law. Libel and defamation law have defined the pivotal act as the publication of the defaming material, and it has eased courts' interpretation of the statute of limitations.²¹⁴ It prevents there being a perpetual time period to bring a claim against an alleged libelous material that is online, and it distinguishes

²⁰⁸ See *Rivera v. NYP Holdings, Inc.*, 2007 N.Y. Misc. LEXIS 5684, at ***5–7 (Sup. Ct. N.Y. Cnty. Aug. 2 2007).

²⁰⁹ *Penaherrea*, No. 150366, 2013 N.Y. Misc. LEXIS 7148, at *16.

²¹⁰ *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 276–79 (S.D.N.Y. 2016).

²¹¹ *Morelli v. Wey*, No. 153011, 2016 N.Y. Misc. LEXIS 4706, at *17 (Sup. Ct. N.Y. Cnty. Dec. 16, 2016).

²¹² *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 268 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015).

²¹³ *Morelli*, 2016 N.Y. Misc. LEXIS 4706, at *18–19.

²¹⁴ *Shamely v. ITT Corp.*, 869 F.2d 167, 172 (2d. Cir. 1989) (“[a] cause of action for defamation accrues when the material is published.”).

when a new publication or act occurs. Courts should interpret an act of copyright infringement on the internet similar to a “publication” of libelous material on the internet. After all, the “publication” of slanderous material is the *tortious act* that libel law is focused on, when the tortfeasor has completed all actions to commit the tort.²¹⁵ This concept is not novel to copyright law and has been adopted in certain circuits under a different name: the “make available” doctrine.²¹⁶ The Fourth Circuit was one of the first circuits to adopt the “make available” doctrine.²¹⁷ In *Hotaling*, and the court focused on how the alleged infringer had “completed all the steps necessary for distribution to the public.”²¹⁸

[59] The Fourth Circuit believed that the moment of infringement occurred when an alleged infringer completed all the steps necessary for distribution to the public. No matter how many times the work that was “made available” was seen by others, the infringer’s last “act” was making the infringing work available for distribution.²¹⁹ The parallels between the two areas of law are evident. In order to develop the law on the Copyright Act’s statute of limitations for alleged online infringement to prevent perverse incentives and unfair outcomes, courts need to interpret the “last infringing act” in copyright law similar to how they interpret what constitutes a “publication” or “republication” under libel law’s “single publication rule.” Otherwise, the statute of limitations will begin again each

²¹⁵ See generally *Mims v. Metropolitan Life. Ins. Co.*, 200 F.2d 800, 801 (5th Cir. 1952) (“Publication is essential to libel, and the publication must be made to one or more third parties.”).

²¹⁶ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F. 3d 199, 203 (4th Cir. 1997).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

time online material is accessed.²²⁰ Practically, this means that the three-year limitations period will not begin to run until the copyright expires or the alleged infringer takes the material off the website. These requirements to begin the running of the statute of limitations would be contrary to interpreting a last infringing “act,” since the affirmative action an alleged infringer takes to actually begin the statute of limitations is either: (1) not an infringing act (*i.e.* removing the alleged infringing material from their website), or (2) completely non-existent (*i.e.* no “act” is necessary for a copyright term to expire).

B. Exceptions to Statute of Limitations Defense

[60] A single publication rule would not place plaintiffs at an unfair advantage. This rule would only affect plaintiffs who are aware they have a claim but have chosen not to file that claim in a timely manner.²²¹ In the other set of circumstances, “if the defendant is aware that the plaintiff has a potential claim, but the plaintiff is not, then often either the *discovery rule* of accrual or *doctrine of fraudulent concealment* can be used to effectively toll the limitation period until the plaintiff becomes aware of the potential claim.”²²²

1. Discovery Rule

[61] Civil actions for copyright infringement must be “commenced within three years after the claim accrued.”²²³ One exception to statutes of limitations is the discovery rule. The discovery rule states that “an

²²⁰ See *APL Microscopic v. United States*, 144 Fed. Cl. 489, 498–99.

²²¹ See generally *Ochoa & Wistrich*, *supra* note 12, at 487 (“The policy of placing plaintiffs and defendants on an equal footing has been influential in shaping the limitation period.”).

²²² *Ochoa & Wistrich*, *supra* note 12, at 487 (emphasis added).

²²³ 17 U.S.C. § 507(b).

infringement claim does not “accrue” until the copyright holder discovers, or with due diligence should have discovered, the infringement.”²²⁴ The defendant “bear[s] the burden of demonstrating” that the plaintiff had reason to believe of an infringement “and, if they do so, the burden shifts to [the plaintiff] to show that it exercised reasonable due diligence and yet was unable to discover its injuries.”²²⁵

[62] Courts applying the “single publication” rule in libel law have already recognized that the discovery rule delays the accrual of a defamation action until the plaintiff discovers—or reasonably should have discovered or suspected—the factual basis for his or her claim.²²⁶ Similarly, federal courts have continued to apply the discovery rule to copyright infringement claims.²²⁷ In fact, each circuit court that has considered the issue of claim accrual in the context of infringement claims has adopted the discovery rule.²²⁸

[63] The discovery rule helps mitigate the concerns that a copyright holder would not uncover an infringement online until three years after the

²²⁴ *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014).

²²⁵ *William A. Graham Co. v. Haughey*, 568 F.3d 425, 438 (3d Cir. 2009) (internal citations and punctuation omitted).

²²⁶ *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007).

²²⁷ *See Psihoyos*, 748 F.3d at 124.

²²⁸ *See id.*; *see, e.g.*, *Diversey v. Schmidly*, 738 F.3d 1196, 1200–01 (10th Cir. 2013); *William A. Graham Co.*, 568 F.3d at 433–37 (“[U]se of the discovery rule comports with the text, structure, legislative history and underlying policies of the Copyright Act”); *Warren Freedenfeld Assocs., Inc. v. McTigue*, 531 F.3d 38, 44–46 (1st Cir. 2008); *Comcast of Illinois v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 390 (6th Cir. 2007); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 705–07 (9th Cir. 2004); *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796 (4th Cir. 2001).

original uploading of the infringing content. As long as the copyright holder exercises the “due diligence” of a reasonable person to find possible infringement, the statute of limitations can be tolled for situations where a possible infringement is hidden or nearly impossible to find online.²²⁹

2. Doctrine of Fraudulent Concealment

[64] The case law is clear that “fraudulent concealment of the existence of a cause of action tolls the running of the statute of limitations.”²³⁰ The term “fraudulent concealment” implies “active misconduct . . . to throw [copyright holders] off the scent [of infringement].”²³¹ The significance of the doctrine of fraudulent concealment is that “it frustrates even diligent inquiry.”²³² For example, in *Taylor v. Meirick*, the defendant put their own fraudulent copyright notice on the plaintiff’s maps.²³³ Since modern maps look similar and the copyrightable, elements of plaintiff’s maps were subtle, the changing of the copyright notice allowed detection of the use of these subtle copyrighted features “easily escap[able].”²³⁴

[65] The tolling for fraudulent concealment lasts only as long as the fraud is effective.²³⁵ Fraudulent concealment “does not lessen a plaintiff’s duty of

²²⁹ *Psihoyos*, 748 F. 3d at 124.

²³⁰ *Stone v. Williams*, 970 F. 2d 1043, 1048 (2d Cir. 1992); *See, e.g., Barrett v. United States*, 689 F. 2d 324, 327 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Fahmy v. Jay-Z*, 835 F. Supp. 2d 783, 791 (C.D. Cal. 2011); *C.A. Inc. v. Rocket Software, Inc.* 579 F. Supp. 2d 355, 361 (E.D.N.Y. 2008).

²³¹ *Taylor v. Meirick*, 712 F. 2d 1112, 1118 (7th Cir. 1983).

²³² *Id.*

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *See Prather v. Neva Paperbacks Inc.*, 446 F.2d 338, 341 (5th Cir.1971).

diligence; it merely measures what a reasonably diligent plaintiff would or could have known regarding the claim.”²³⁶

[66] The doctrine of fraudulent concealment can apply to online infringement cases in a variety of circumstances. For example, if an alleged infringer changes the copyright notice like in *Meirick*, claims to be the photographer of a picture of a commonly captured landscape,²³⁷ or places the infringement behind a password protection, then the copyright holder can argue that the doctrine of fraudulent concealment should toll the three-year statute of limitation period.

C. Laches

[67] Another possible solution is for Congress to clarify that the 1976 Copyright Act did not intend to eliminate the laches defense. The Supreme Court in *Petrella* held that the defense of laches is not available to *any* copyright infringement claim that seeks monetary damages;²³⁸ however, this holding allows the possibilities of inequitable future decisions, especially in cases involving the internet and statutory damages.²³⁹

[68] Lower courts have already recognized the possibility that “‘unusual cases’ where ‘the relief sought will work an *unjust* hardship upon the defendants or upon innocent third parties,’ the doctrine of laches may be

²³⁶ *Stone v. Williams*, 970 F. 2d at 1049; *see also* *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir.1982) (holding that alleged additional acts of concealment by defendant beyond original fraud do not exempt the plaintiff from the requirement of diligence in pleading the federal equitable tolling doctrine of fraudulent concealment).

²³⁷ *See Meirick*, 712 F. 2d at 1117.

²³⁸ *Petrella v. MGM*, 572 U.S. 663, 691–92 (2014) (Breyer, J., dissenting).

²³⁹ *See supra* Section III(b).

available in a copyright infringement action.”²⁴⁰ The majority opinion in *Petrella* ignored the possibilities of these “unusual cases,” using thin legal arguments to reach its holding.²⁴¹

[69] Imagine these two hypothetical situations. In the first situation, a photographer takes a photograph and agrees, or licenses, a website to use the photograph in one of its online stories (with the photographer retaining the copyright interests in the photograph). Thirty years later, the photographer sells their copyright interests to a third-party. Ten years after obtaining the copyright interest, the third-party finds the website’s story that used the photographic and sues for copyright infringement. The problem is that it has been forty years since the story’s publication, and all the email communications have been deleted (assume this website company deletes their emails after 5 years), all documents have been lost/delete/misfiled, and all the employees that created the website’s story with the photograph have left the company and cannot be found. As an omniscient onlooker, we know that the third party’s suit should be dismissed since the website licensed the photograph as to not commit any copyright infringement. However, neither party knows nor can prove this licensing agreement as a result of the forty-year passage of time. According to the court in *APL Microscopic*, this hypothetical lawsuit would result in a clear finding of infringement by the website since each time the website with the photograph is accessed, there is a new “distribution” and “display” of the copyrighted photograph.²⁴² The only unknown to be litigated would be the amount of damages.²⁴³ The

²⁴⁰ *Virtual Studios, Inc. v. Hagaman Industries, Inc.*, 984 F. Supp. 2d 830, 838 (E.D. Tenn. 2013) (quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 320 (6th Cir.2001)) (emphasis in original) (internal quotations omitted).

²⁴¹ *See supra* Section II(c).

²⁴² *See APL Microscopic v. United States*, 144 Fed. Cl. 489, 499.

²⁴³ *See* 17 U.S.C. § 504(c)(1) (amounting to statutory damages “not less than \$750 or more than \$30,000” or some amount equal to the fair market value of the licensing market for the photograph).

laches defense would theoretically be applicable, since the forty-year delay (thirty years by photographer and ten years by the third party) has created unjust prejudice to the defendant website;²⁴⁴ however, without intervention from Congress, the Supreme Court's holding in *Petrella* would bar any argument involving laches.²⁴⁵ As a result, the website owner would be liable for copyright absent a court applying the "single publication rule."²⁴⁶

[70] In the second situation, the same photographer licenses their photograph to a website for one of its online stories. Thirty years later, the photographer dies. The copyright in the photograph is still valid for another seventy years.²⁴⁷ Photographer's heirs find the online story with the photograph thirty years after photographer's death and sue the website for copyright infringement. Much like hypothetical 1, any evidence of the licensing agreement that occurred sixty years ago has been lost, witnesses have died or cannot be found, and a court following *APL Microscopic* finds infringement. Even though the delay both by the photographer and his/her heirs created unjust prejudice for the defendant website, the defense of laches is not available due to *Petrella*.²⁴⁸ The only possibility for a just

²⁴⁴ See generally *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001) (quoting "Thus, for these seven movies, the period of delay ranges from thirty-six years (Dr. No) to nineteen years (The Spy Who Loved Me). By any metric, this delay is more than enough.").

²⁴⁵ See *Petrella v. MGM*, 572 U.S. 663, 663 (2014).

²⁴⁶ See *APL Microscopic*, 144 Fed. Cl. at 496, 499 (After showing a prima facie case of infringement, absent an affirmative defense of a license, there would be an infringement due to the new "distribution" and "display"); see also *Petrella*, 572 U.S. at 663. (The defendant would also not be able to argue laches apply due to the long prejudicial delay).

²⁴⁷ See 17 U.S.C. § 302 (a) (Copyright in a work created on or after January 1, 1978...endures for a term consisting of the life of the author and 70 years after the author's death.").

²⁴⁸ See *Petrella*, 572 U.S. at 663.

outcome would be for the court to embrace the “single publication rule” and hold that the statute of limitations bar any recovery.

[71] Although these hypotheticals may be rare and out of the ordinary, they are exactly within the category of the “few and unusual”²⁴⁹ type of cases that the laches defense is designed to address. The three driving factors that create these “few and unusual” cases usually are (1) the material will always be available unless an affirmative action is taken (*i.e.* if the server it is stored on is destroyed or the data is overwritten);²⁵⁰ (2) anyone with internet access can access the material at any time as long as the material is present on a server (without restrictions like password protection, geo-blocking, etc.);²⁵¹ and (3) the lifespan of online material and access to the online material have the ability to outlive access to evidence of licensing agreements.

[72] Without congressional intervention to overturn the clear Supreme Court precedent that the laches defense is not available in copyright infringement actions, the above hypothetical lawsuits punish an innocent, non-infringing website that properly licensed a work. Although the hypotheticals presented plaintiffs who were also not aware of the licensing agreement, it is easy to imagine the perverse incentives created for plaintiffs to delay bringing a lawsuit in order for evidence of licensing agreements to vanish. The potential plaintiff would always have three years after the last

²⁴⁹ *See id.* at 700 (Breyer, J., dissenting).

²⁵⁰ *See generally* Miles Young, *How Long Do Your Online Posts Stay on the Internet?*, BUS. 2 CMTY. (Apr. 24, 2013), <https://www.business2community.com/social-media/how-long-do-your-online-posts-stay-on-the-internet-0474996> [<https://perma.cc/W9XU-US3G>] (describing the permanency of the internet).

²⁵¹ *See id.*

date they accessed the allegedly infringing material to bring a lawsuit.²⁵² This would be against the core rationales of statutes of limitations.²⁵³

[73] If Congress refuses to refute the Supreme Court precedent that the laches defense is unavailable against claims of copyright infringement, the courts need to interpret the “last infringing act” as the “publication” of the online material in order to avoid perverse incentives for potential plaintiffs. Adopting a “single publication rule” would eliminate concerns that a potential plaintiff will file a copyright lawsuit over ten, thirty, or even one hundred years later by looking to when an alleged online infringer “published” or “made available” the material that included the copyrighted work.²⁵⁴

V. CONCLUSION

[74] Much of the case law related to copyright infringement and its statute of limitations was developed in cases where infringement took place in the physical world, not online.²⁵⁵ Relying upon this case law without consideration for the unique differences of how content is stored and shared on the internet will create impractical results and perverse incentives.²⁵⁶ The first of what is sure to be many unrealistic decisions was the United States Court of Federal Claims’ holding in *APL Microscopic*, which practically

²⁵² See *APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489, 494 (2019).

²⁵³ See *Lambert*, *supra* note 2, at 496–97; *Ochoa & Wistrich*, *supra* note 12, at 460.

²⁵⁴ In general, copyright length for works created after 1976 are for the life of the author plus 67 years. See 17 U.S.C. § 304 (a)(B)(ii) (2020). This could potentially result in over 100 years of a latent infringing online content that was posted and never touched by the alleged infringer for over 100 years, if the infringement occurred thirty years before the copyright owner’s death.

²⁵⁵ See, e.g., *Petrella*, 572 U.S. at 674.

²⁵⁶ See *Petrella*, 572 U.S. at 689 (Breyer, J., dissenting); *APL Microscopic*, 144 Fed. Cl. at 495.

eliminated copyright infringement's statute of limitations on the internet.²⁵⁷ If content is never removed, it will be continually distributed or displayed in the eyes of some courts in perpetuity.²⁵⁸ As a result, anytime within three years of the expiration of a valid copyright the owner of the respected copyright will be able to bring an infringement claim.²⁵⁹

[75] On the internet, the new statute of limitations for infringement becomes the life of the copyright plus three years. The Seventh Circuit has held the Copyright Act's statute of limitations considers certain acts of infringement to be "continuing wrongs;" that *any* related infringing act within three years would allow the plaintiff to recover *all* potential damages for the entire length of the alleged infringing acts.²⁶⁰ Other courts have been persuaded by the argument that defendant's statute of limitations interests are protected since plaintiff's can only recover the damages they incurred for the infringements that occurred over the three years prior to filing a claim, thus limiting the damages of a repeated, separately accruing infringement.²⁶¹ This argument, however, does not address the problem of statutory damages, which will be the same per infringement amount of damages no matter when the copyright infringement claim is brought.²⁶²

²⁵⁷ See *APL Microscopic*, 144 Fed. Cl. at 498; Eric Goldman, *There is Essentially No Statute of Limitations for Online Copyright Infringement—APL v. U.S., TECH. & MKTG. L. BLOG* (Sept. 4, 2019), <https://blog.ericgoldman.org/archives/2019/09/there-is-essentially-no-statute-of-limitations-for-online-copyright-infringement-apl-v-us.htm> [<https://perma.cc/Q6F5-QMK3>].

²⁵⁸ See generally *APL Microscopic*, 144 Fed. Cl. at 498 (discussing the finding of new distributions and displays each time a website is accessed).

²⁵⁹ See *APL Microscopic*, 144 Fed. Cl. at 498.

²⁶⁰ See *Taylor v. Meirick*, 712 F.2d 1112, 1118–20 (7th Cir. 1983).

²⁶¹ See *Hoey v. Dixel Sys. Corp.*, 716 F. Supp. 222, 223 (E.D. Va. 1989).

²⁶² See 17 U.S.C. § 504(c)(1).

[76] It goes against the basic rationales of statute of limitations if plaintiffs are allowed to sit on their hands when they have a claim, allowing evidence beneficial to a defendant go stale and making accurate adjudications impossible.²⁶³ Instead, courts need to recognize the inherent difference of copyright infringement in tangible mediums and copyright infringement on the internet. By adopting a “single publication” rule similar to adopted in state libel law to interpret when the potential defendant’s *actions* constitute copyright infringement, courts will once again interpret the start of the Copyright Act’s statute of limitations at the time the statute intended: when the plaintiff knew or should have known of the alleged infringing actions. This rule would not have unfair negative effects on plaintiffs, because it would only affect plaintiffs who knew or should have known they had a claim but decided to unjustly wait to file that claim. The discovery rule and doctrine of fraudulent concealment will help protect unknowing plaintiffs and punish defendants who attempt to conceal their activities.²⁶⁴

[77] Finally, Congress needs to clarify that the 1976 Copyright Act does not preclude the laches defense. The laches defense’s purpose is to protect defendants in situations where a “continuing wrong” or “separately accruing” interpretation of the statutes of limitations are taken advantage of by underhanded plaintiffs who create unjust delays and prejudices as a result of the delays.²⁶⁵ It is easy to imagine a situation where a wily plaintiff will unjustifiably delay bringing an infringement claim, and it is even easier to imagine how that unjustified delay would unfairly prejudice a potential defendant. These measures need to be taken before the case law on the statute of limitations for online copyright infringement spirals out of control and opens the doors for unscrupulous plaintiffs to bring unfair and false accusations of copyright infringement that potential defendants will be

²⁶³ See Lambert, *supra* note 2, at 496–97; see also Ochoa & Wistrich, *supra* note 12, at 460.

²⁶⁴ See Ochoa & Wistrich, *supra* note 12, at 487.

²⁶⁵ See *Danjaq LLC v. Sony Corp.* 263 F.3d 942, 951 (9th Cir. 2001).

unjustly unable to defend as a result of the large delay in time between their alleged actions and the filing of the claim.