

No. 12-1315

**In The
Supreme Court of the United States**

PAULA PETRELLA,
Petitioner,

v.

METRO-GOLDWYN-MAYER, INC., *et al.*,
Respondents.

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

**BRIEF OF THE AUTHORS GUILD, INC.;
AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC.; AMERICAN
PHOTOGRAPHIC ARTISTS; GRAPHIC ARTISTS
GUILD; NORTH AMERICAN NATURE
PHOTOGRAPHY ASSOCIATION; NATIONAL
PRESS PHOTOGRAPHERS ASSOCIATION; THE
PICTURE ARCHIVE COUNCIL OF AMERICA, INC.;
SONGWRITERS' GUILD OF AMERICA, INC. AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI*¹

Amici are associations of individual songwriters, cartoonists, illustrators, authors, and photographers who rely on the royalty streams from the licensing of their copyrighted works for their livings. They have fought to: procure satisfactory domestic and international copyright protection; secure fair payment of royalties, license fees and non-monetary compensation for authors' work; and annually help hundreds of members negotiate and enforce the publishing agreements that earn their members a living, whether the work is "mainstream" or "academic."

The *amici* are as follows:

- **The Authors Guild, Inc.** ("Guild"), founded in 1912, is a national non-profit association of almost 8,500 professional, published journalists, historians, biographers, and other writers of nonfiction and fiction. Guild members have won Pulitzer and Nobel Prizes, National Book Awards, and many other accolades. The Guild works to promote the professional interests of authors in various areas, including copyright, freedom of expression and taxation.

¹ The parties have lodged blanket consent to the filing of *amicus* briefs with the Clerk. No counsel for a party wrote this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- **American Society of Media Photographers, Inc.** represents professional publication-based photographers, and is the oldest and largest organization of its kind in the world. Its roughly 7,000 members include all manner of professional photographers whose works appear in books, magazines, newspapers, web uses, corporate reports, publicity, and advertising.
- Since 1982, **American Photographic Artists** (“APA”) has dedicated itself to the photographic community’s creative and professional well-being, and its members include world leaders in the field of photography. It represents the interests of individual photographers throughout the United States and overseas. APA actively encourages the establishment of clarity, transparency, stability, cooperation, and fairness in copyright transactions, and is strongly opposed to the establishment of copyright policies that weaken the rights of authors.
- The **Graphic Artists Guild** represents the interests of individual illustrators, designers, web creators, production artists, cartoonists, surface designers and other graphic creators in judicial and legislative fora. Copyright protection of creative works and their authors' rights is particularly important to the Guild, as those rights enable its members to support themselves and to create new works for the benefit of the public.

- **North American Nature Photography Association** is the leading association for those involved with nature photography. Its approximately 2,500 members include photographers, editors, publishers and picture archive proprietors who use nature photography as a medium of communication, nature appreciation, and environmental protection.
- The **National Press Photographers Association** (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including copyright and freedom of the press in all its forms, especially as it relates to visual journalism.
- **The Picture Archive Council of America** (PACA) has developed business standards, promoted ethical business practices and actively advocated copyright protection on behalf of its members for over 60 years. Established in 1951 by a group of stock photo agencies, its membership has evolved to include over 100 companies involved in digital content licensing. Although technology has changed, PACA has retained its focus on protecting the rights of creators and those representing their work.

- **The Songwriters’ Guild of America, Inc.** (“SGA”) is the nation’s oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over eighty years of advocacy experience concerning the rights of music creators, songwriters, and their heirs. SGA’s activities on behalf of all U.S. songwriters include advocacy before the U.S. Congress to obtain favorable legislation for music creators and heirs, and participation as a party or as amicus curiae in litigation of significance to the creators of the American canon of popular music.

SUMMARY OF ARGUMENT

The Copyright Act contains a three-year statute of limitations that permits plaintiffs to bring infringement suits for three years after the claim accrued. The text of the Copyright Act sets forth a straightforward way of calculating the availability of repose: so long as the copyright subsists, infringements occurring within the three-year period are actionable, and those outside that period are not. Despite the existence of a statute of limitations, the Ninth Circuit decided that laches can bar a suit brought *within* the statutory period. The Ninth Circuit’s ruling is wrong.

Laches is a judge-made equitable defense that can excuse a defendant’s liability if the plaintiff negligently delayed in bringing a suit and that delay prejudiced the defendant either by causing him to engage in otherwise prohibited activity or by harming his ability to present evidence in his

defense. A statute of limitations forecloses the laches defense because it evinces the legislature's balancing of policy interests within a particular statutory scheme. The policy of the Copyright Act is to ensure that authors have an incentive to create works by compensating them, a policy balanced against societal interests in calming disputes. Here, Congress defined a "reasonable" litigation delay by creating the three-year statute of limitations period. Moreover, Congress prevented potential defendants from being misled into thinking that their uses are statutorily permissible.

In addition, the Copyright Act contains provisions designed to deal with the reality that evidence of certain facts will deteriorate with the passage of time. The concern about evidentiary prejudice has little weight in a statute that Congress designed to last long after the author's death, and provided documentary mechanisms designed to quiet title. Moreover, the Ninth Circuit's extra-textual approach poses a threat to other provisions that enable individual authors to recapture lost rights.

Equity has a role to play in the arena of copyright litigation, but not the one that the Ninth Circuit's opinion suggests. The plaintiff's delay can certainly be taken into account at the remedial stage, during which the court can balance the hardships of issuing an injunction, the injury to the plaintiff, and the public interest.

ARGUMENT

I. THE PRESENCE OF A STATUTE OF LIMITATIONS PRECLUDES RELIANCE ON THE LACHES DOCTRINE AS A MATTER OF LAW.

Amici represent the perspective of individual authors and heirs, “for whom copyright is supposed to provide a signal that we are a nation that believes in culture and creativity so much that we're going to provide an atmosphere where you can devote your life to that kind of activity.”² *See also, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (noting importance of profit motive to the advancement of knowledge); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright as the economic engine of protected expression). They write in this case because the lower court incorrectly ignored the express instructions of Congress in the statutory text of the Copyright Act in a manner that threatens *amici*'s ability to enforce their exclusive rights.

Congress provided that an individual must bring each claim within three years of its accrual or

² Nate Anderson, *New Register of Copyrights: “Unfortunately, I Start with Enforcement,”* *Ars Technica* (July 13, 2011) (Interview with Maria Pallante, Register of Copyrights), <http://arstechnica.com/tech-policy/2011/07/new-register-of-copyrights-unfortunately-i-start-with-enforcement/>

be barred from recovery for that specific claim. *See* 17 U.S.C. § 507(b). Notwithstanding these instructions, the Ninth Circuit affirmed the trial court’s decision that laches can bar a claim brought *within* the three-year statute of limitations period, effectively expropriating the exclusive rights of the author’s heir under *Stewart v. Abend*, 495 U.S. 207, 220-21 (1989); Pet. App. at 18a. The Ninth Circuit’s equitable “balancing” improperly supplanted express legislative policy judgments.

A. The Text of the Copyright Act Prohibits the Imposition of Laches During the Limitations Period.

The Copyright Act creates a procedure for filing claims that leaves no room for the Ninth Circuit’s construction. The statutory text provides that infringement occurs when “anyone” violates the exclusive rights of the author or the copyright owner, “as the case may be.” 17 U.S.C. § 501(a). The copyright owner, in turn, may institute an action for “any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b). Once that infringement occurs, the Act’s structure requires that a “civil action” be “commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). This language notwithstanding, the Ninth Circuit found that the trial court did not abuse its discretion in applying a laches defense to a claim brought within that three-year period. Pet. App. at 18a.

**1. Congress’s Use of Standard
Accrual Language Forecloses
Reliance on a Laches
Defense.**

The Ninth Circuit’s rule finds no support in this Court’s precedent or the Copyright Act’s statute of limitations. “Laches within the term of the statute of limitations is no defense at law.” *United States v. Mack*, 295 U.S. 480, 489 (1935). “If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.” *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *see also Lyons P’ship v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) (noting that “a court should not apply laches to overrule the legislature’s judgment as to the appropriate time limit” and that “Separation of powers principles” bar application of laches to a timely claim).

The Copyright Act’s statute of limitations requires that an infringement case must be brought within three years of when each claim “accrued.” 17 U.S.C. § 507(b). Accrual, in turn, has a well-established ordinary meaning: “In common parlance a right accrues when it comes into existence” *United States v. Lindsay*, 346 U.S. 568, 569 (1954). Consistent with that “standard rule,” a claim accrues “when the plaintiff has a complete and present cause of action.” *Gabelli v. Sec. & Exch. Comm’n*, 133 S. Ct. 1216, 1217 (2013) (internal quotations omitted);

see also Crown Coat Front Co. v. United States, 386 U.S. 503, 507 (1967); *Reiter v. Cooper*, 507 U.S. 258, 263 (1993).³ The “most natural reading” of an Act’s accrual language, *Gabelli*, 133 S. Ct. at 1217, therefore, is that when “infringement occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][1][b] (2012) [hereinafter Nimmer] (collecting cases).

This result flows naturally from the purpose of the statute: “copyright law *celebrates* the profit

³ *Amici* note that Congress encouraged the courts to use the traditional notions of equity for tolling the statute of limitations, notably in situations involving fraudulent concealment. S. Rep. No. 85-1014, at 3 (1957) (quoting H. Rep. No. 85-150) (“Equitable considerations are available to prolong the time for bringing suit . . .”); *see Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983); *see also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][3] (2012) (“lulling the plaintiff into inactivity” could estop a defendant from asserting the statute of limitations defense). For *amici*’s members who are frequently beneficial owners of copyright and rely on publishers or other intermediaries to honor the scope of licenses, such concepts are critically important. When this position of trust is violated, it should be viewed as a form of constructive fraud. *Cf. Beidleman v. Random House, Inc.*, 621 F. Supp. 2d 1130, 1133 (D. Colo. 2008). Such equity doctrines, however, serve only to extend the limitations period, not to shorten it.

motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science.” *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) (emphasis added), *aff’d*, 60 F.3d 913 (2d Cir. 1994). The presence of the rolling three-year period reflects a balance of competing interests: that of compensating authors for their work and advancing science on the one hand, and that of the calming of disputes on the other. The rolling period prohibits infringers from receiving a windfall after a long period of unauthorized exploitation, thereby preserving the incentive to create. *Amici* therefore submit that when suits are brought within the limitations period, “[t]he public good fully coincides in both cases with the claims of individuals.” The Federalist No. 43, at 288 (James Madison) (Cooke ed., 1961).

II. THE PRESENCE OF A STATUTE OF LIMITATIONS DESTROYS THE POLICY REASONS THAT UNDERGIRD THE EXISTENCE OF A LACHES DEFENSE.

Not only does such a result flow naturally from the words Congress chose, the language of the statute naturally destroys the rationale for the availability of a laches defense.

Laches does not result from a mere lapse of time, but from that fact that ... [b]y his negligent delay, the plaintiff may have *misled* the defendant or

others into acting on the assumption that the plaintiff has abandoned his claim, or that he acquiesces in the situation, or that changed circumstances may make it more difficult to defend against the claim.

11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2946, at 117 (2d ed. 1995) (emphasis supplied) (quoting William Quinby de Funiak, *Handbook of Modern Equity* § 24, at 41 (2d Ed. 1956)). The existence of a statute, and the structure of the Copyright Act, eliminates all of these elements.

A. The Three-Year Statute of Limitations Defines “Reasonable” Delay.

The lower court incorrectly balanced factors already taken into account by the passage of section 507. In its view, the petitioners’ delay was unreasonable because the evidence suggested that rather than having difficulty raising the money to hire counsel, petitioner was merely waiting to capitalize on the defendant’s investment in the picture. Pet. App. at 9a-10a.

For claims brought within the statutory window, such concerns are entirely irrelevant. The creation of the three-year accrual period tells both the plaintiff—and the defendant—what a “reasonable” delay entails: those claims that have accrued more than three years prior to the commencement of a suit. Petitioner’s prosecution of

her claim in this case might seem less than zealous, but the statute has already exacted a price for that inactivity: she cannot claim damages for all 18 years of alleged infringement: only the most recent 3 are within a “reasonable” delay. Given the three-year window that applies to both sides, the question of “unreasonable” delay is one that Congress has considered and settled—with the unequivocal endorsement of the Respondent’s storied industry association. *See Copyrights-Statute of Limitations: Hearings on H.R. 781 Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong. 48 (1955) [hereinafter Hearings]* (Statement of Mr. Brylawski, representative of the American Motion Picture Association) (“Every performance of every moving picture is a separate infringement – if they occurred three years ago. That would be barred in three years. But the next time they showed it a new infringement occurred which would be actionable.”); *see also id.* at 49 (“we welcome the [three-year] period”).

Moreover, the Ninth Circuit’s *ad hoc* consideration of such concerns within the three-year window poses a special threat to individual authors who face serious practical bars to enforcement. The average cost to litigate a copyright claim worth less than one million dollars through appeal is roughly \$350,000. Am. Intellectual Prop. Law Assoc., *Report of the Economic Survey 2011* at 35 (2011) [hereinafter *AIPLA Report*]. As the Copyright Office recently noted, those costs “are not only completely disproportionate to what most individuals could invest in a lawsuit, but also to what a copyright claimant could ever hope to recover in a relatively

modest infringement case.” U.S. Copyright Office, *Report on Small Claims* at 3 (2013) (citing *AIPLA Report*); see generally Comments of Am. Soc’y of Media Photographers (Jan. 16, 2012) (listing reasons why these infringement claims are unremedied), http://www.copyright.gov/docs/smallclaims/comments/04_asmp.pdf; Comments of Authors Guild at 2-3 (over half of the Guild’s members supporting establishment of a small claims court), http://www.copyright.gov/docs/smallclaims/comments/08_authors_guild.pdf (last visited Nov. 19, 2013).

That problem is especially acute in the internet arena, and some publishers simply weigh the use of an image against the chances of getting caught. Comments of Nat’l Press Photographers Ass’n at 2 (Jan. 16, 2012), http://www.copyright.gov/docs/smallclaims/comments/36_nppa.pdf. Sites such as Scrib’d (www.scribd.com), Pinterest (www.pinterest.com) and Facebook (www.facebook.com) are replete with images taken and used without the author’s consent, and it will never be practical to seek a remedy even if the author knows the identity of the individual infringer. The availability of statutory damages and attorney’s fees under 17 U.S.C. § 412, while extremely important to obtaining redress, do not overcome *amici*’s practical obstacles to enforcement.

Thus, in those rare cases where an individual author *does* sue, her expectation of recovery cannot be an equitable bar to bringing the infringement claim within the limitations period. Bringing suit when the infringer stands to make a profit is not only what makes the lawsuit viable and

“reasonable,” it is an economic necessity.⁴ The practicalities and expense of copyright enforcement create the reality that the line between “financing litigation” and “profit” will be impossible to know in many instances *ex ante*.

B. The Separate Accrual Rule Limits the Legitimate Expectations of Those Who Use Works Without Permission.

Second, the three-year term represents a congressional judgment over the proper scope of what the lower court characterized as “expectations-based prejudice,” Pet. App. 12a,—namely, that the plaintiff took actions or suffered consequences that it would not have on the grounds that it was “mised.” See Wright, *supra*, § 2946, at 117. The lower court found such prejudice based on the fact that Respondents had entered into a variety of business dealings with the belief that it owned rights to the *Raging Bull* screenplay, and that it was entitled to the expectation that it owned the copyright given the plaintiff’s delay. Pet. App. at 17a.

The express separate accrual of individual claims under section 507 prevents defendants from undergoing constructive bamboozlement by virtue of

⁴ See Comments of Graphic Artists Guild at 3-4 (Jan. 16, 2012), http://www.copyright.gov/docs/smallclaims/comments/23_graphic_artists_guild.pdf; Comments of Nat’l Press Photographers Ass’n, *supra*, at 7.

a plaintiff's delay. When it amended the Copyright Act to add the limitations period, Congress was well aware that the adoption of an accrual rule would create risk for defendants engaged in exactly this kind of activity. It distinguished the kind of statute it adopted in the Copyright Act from others that served to bar the plaintiff's right to sue permanently. S. Rep. No. 85-1014, at 3 (1957) (noting that the legislation was intended only to extinguish the remedy available for an instance of infringement, not the copyright itself); H.R. Rep. No. 84-2419, at 2 (1956) (same). Notwithstanding the well-established nature of the separate accrual rule, *see Hearings, supra*, at 48, the lawful renewal of the copyright in the 1963 screenplay, and the earlier infringement claims by the petitioner, Respondents continued to exploit *Raging Bull* with its eyes wide open. They took that risk notwithstanding the conflict between their current contentions and the presumptive validity of the facts contained in the registration certificate and the other subject works. *See* Pet. Br. at 13-14; Copyright Act of 1909, Pub. L. No. 60-349, §§ 209-10 (1909) (as amended).

Amici therefore have little sympathy for Respondents, especially given the disparity in bargaining power and resources that typically exists between an individual author looking to license a work and the intermediary looking to purchase it. Respondents certainly are entitled to a trial, and may be (though are probably not) right about the merits, but the language of the statute insulates them from the kinds of indirect deception that typically warrant application of the laches defense. *See* 17 U.S.C. § 507(b) (only restricting civil actions

to claims brought within three years of accrual). Compare Wright, *supra*, § 2946, at 117 (describing inequitable changed circumstances resulting from a plaintiff's negligent delay), with Nimmer, *supra*, § 12.06[B][3] (stating that "a false sense of security" does not give rise to laches). Congress has already balanced the Respondents' interests in their expectations, and told them when their liability begins and ends. They undertook the use of the work at their peril. See JA 128 ("When the Supreme Court case of *Stewart v. Abend* was decided, we reviewed the status of "Raging Bull" and we concluded that your clients did not have a claim under that case.").

C. The Copyright Act Contains Provisions Designed to Minimize Evidentiary Prejudice By Placing Special Weight on the Documents Associated with Assertion of the Right.

Third, the structure of the Copyright Act makes irrelevant the presence of "changed circumstances," Wright, *supra*, § 2946, at 117, that the District Court described as "evidentiary prejudice" to deny the author's heir her claim. Pet. App. at 45a-46a.⁵ The District Court relied on such prejudice and granted judgment to the defendant

⁵ The Ninth Circuit declined to address so-called "evidentiary prejudice" resulting from the passage of time and loss of witnesses. Pet. App. at 12a.

with respect to both damages and injunctions, and dismissed the claim. *Id.* at 45a-46a (noting that certain of Respondents’ defense witnesses are unable to remember relevant details of the work’s creation due to death or disability).

The District Court’s holding poses a particular danger to the revenue streams of individual authors’ heirs, who must rely on documentary evidence to establish their entitlement to the revenue stream that Congress sought to protect for them. *Abend* holds that if an author dies before the renewal interest vests, the heir can renew the copyright in her name, and makers of derivative works under the old registration must receive a license for subsequent use. *Abend*, 495 U.S. at 220-21. The doctrine, however, only applies if the best witness regarding creation is dead: the right passes only to his successors. *See id.* at 215 (quoting *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 378 (1960)) (“An assignee of the renewal rights takes only an expectancy ... ‘Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may never occur’”). The *Abend* Court expressly rejected the judgment of an appellate court determining that the heir’s right to a renewal term was “necessitated by a balancing of the equities” because Congress had performed any needed balancing in the statute itself. *Abend*, 495 U.S. at 222, 227 (rejecting *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977)).

Amici submit that the lower court committed the same sin when it substituted its own judgment regarding the equities of this case for that of the

legislature, and divested the Petitioner of her exclusive rights. *See* Pet. App. 45a-46a. The term of copyright is long, and the death of an author is a recognized and expressly accounted-for part of the copyright system. The Copyright Act (including its statute of limitations) reflects considered Congressional judgments regarding the consequences of an author's death. For this reason, the act puts a special emphasis on documentary evidence. *See, e.g.*, 17 U.S.C. § 304(a)(4)(B) (providing presumption of facts in renewal certificate when filed within certain time frame); 17 U.S.C. § 410 (presumption of validity of facts in registration when filed within five years of publication); 17 U.S.C. § 204 (requiring transfers of copyrights to be in writing and stating that acknowledgement is prima facie evidence that the transfer occurred); 17 U.S.C. § 205 (creating rules for handling conflicting claims of ownership depending on when the recordings of such transfers are filed); 17 U.S.C. § 701(c) (requiring copyright office to create seal to authenticate certified documents such as registrations); 17 U.S.C. § 705 (requiring the copyright office to maintain searchable records and indexes open to public inspection); 17 U.S.C. § 707(a) (requiring publication of a catalog of all copyright registrations). As time passes, the facts in such documents will become both the best and conclusive evidence of ownership.

The effect of these rules puts a premium on the due diligence of the grantee at the time it contracts for the right, and to make sure that the instruments it uses properly acquire the precise rights it wishes to own. Under the Act of 1909,

which applied to the work at issue in this case, the registration certificate granted the registrant a presumption that the facts in the certificate were true. Copyright Act of 1909 §§ 209-10; *see* Nimmer, *supra*, § 12.11[C] (describing nature of registration presumptions). Similarly, the nature of a renewal term as an expectancy was also well established. *See Miller Music*, 362 U.S. at 378. The documents in this case utterly contradicted Respondent's assertions, yet it did nothing to perfect its alleged interest. *See* Pet. Br. at 10-11 (describing conflicts between registration, deposited documents, and Respondent's contentions). In such circumstances, the documents will speak for themselves when the author cannot. That rule is particularly apt when a grantee is, as here, attempting to challenge the income stream that *Abend* protects.

Indeed, the problem with the Ninth Circuit's extra-textual approach is that it reaches far beyond *Abend* to potentially affect the rights of authors in other contexts.⁶ Many of *amici's* members rely or will soon rely on their much broader rights to terminate transfers under section 203 of the Copyright Act of 1976. *See* 17 U.S.C. § 203(a)(4)(A) (giving authors a five-year window to terminate

⁶ Because of the peculiarities of renewal registrations, the *Abend* rule applies in a relatively narrow situation under the 1909 Act. Specifically, the work cannot have been for hire, must be created under the 1909 Act, and the author must die before the renewal term vests. *See generally* Nimmer, *supra*, § 9.06[D].

transfers of copyright beginning thirty-five years from the original grant); *see also* 17 U.S.C. § 304(c) (describing termination rights in certain renewal terms).⁷ Suppose, for example, the author of a popular 1979 musical lawfully registers a work in her name, assigns that work in writing to a theatrical production company, and later terminates the transfer late in the fourth year of the five-year window. She then sues the production company for continuing to make performances. Suppose further that the production company—who never contested any of the facts in the registration before this point—claims that it has permission of a joint author to perform the work, but that alleged joint author died in year one of the window. Under the Ninth Circuit’s extra-textual reasoning, a court could interfere with that transfer on equitable grounds, despite the unequivocal Congressional intent to return the copyright to the individual author.

⁷ The reason for the stronger rule was entirely to benefit individual authors, and safeguard them from unremunerative transfers. *See* H.R. Rep. No. 94-1476, at 124-26 (1976) (explaining policy reasons behind the provision). Section 203(b)(1) abrogates a portion of the *Abend* decision in that it permits licensees to continue to exploit certain derivative works made before the termination took effect. 17 U.S.C. § 203(b)(1); *see* H.R. Rep. No. 94-1476, at 127.

III. EQUITABLE CONSIDERATIONS ARE AN APPROPRIATE MEANS FOR TAILORING INJUNCTIVE RELIEF.

Although equity can take notice of Petitioner’s conduct in the pursuit of her claim, it does not have the role that the Ninth Circuit assigned it. Congress granted the courts broad equitable authority to tailor injunctive relief to the facts of a specific case. The Copyright Act provides that “Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem *reasonable* to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a) (emphasis supplied); *Holmberg*, 327 U.S. at 395 (courts are free to “apply their own principles in enforcing an equitable right created by Congress”); *see also* Nimmer § 12.02[D]. In addition, this Court has repeatedly instructed that the “goals of copyright law are ‘not always best served by automatically granting injunctive relief.’” *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994)); *see eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006); *Elvis Presley Enters. v. Passport Video*, 357 F.3d 896, 899 (9th Cir. 2004) (reversing injunctive grant for consideration of the public interest in seeing Elvis Presley materials). *Cf.* 17 U.S.C. § 104A(d)(3)(A) (permitting compulsory license of “reasonable compensation” for certain derivative works).

The unauthorized making of a motion picture from a screenplay represents a “classic example of an unfair use,” *see Abend*, 495 U.S. at 238, and would

ordinarily receive an injunction. *Amici* understand how Petitioner's lack of diligence could cause a court to balance hardships and conclude that Respondents should not have to cease those activities undertaken during a period of delay. The trial court should balance inequities against the reasons given in *Abend* for permitting heirs to retain ownership of renewals, see 495 U.S. at 223, 229, and against the fact that the law does not require that the owner of a copyright license it to anyone. *Fox Film Court v. Doyal*, 286 U.S. 123, 127 (1932). (The equities created by Petitioner's alleged failure to pursue her claims against Respondent's use of *Raging Bull* should not categorically prevent her from enjoining a *Raging Bull* remake.) The lower court, however, balanced those concerns at the wrong point in the proceeding, and did so in a way that injects the systemic uncertainty into the resolution of claims that section 507 was designed to cure.

IV. CONCLUSION

For the foregoing reasons, the decision of the lower court should be REVERSED and REMANDED for further proceedings.

Respectfully submitted,

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