
THE TRIALS AND TRIBULATIONS OF MUSIC IN COPYRIGHT
LAW: LED ZEPPELIN'S ICONIC SONG MAY WALK THE
"STAIRWAY TO HEAVEN" 43 YEARS LATER

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I. INTRODUCTION

"There's a lady who's sure all that glitters is gold; and she's buying a stairway to heaven."¹ *Stairway to Heaven* is often referred to as Led Zeppelin's greatest hit.² Composed over forty years ago, this song, along with other Zeppelin hits, continues to remain popular over many generations.³ Although creative drives may differ among

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¹ See LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Island Records 1971) (reciting opening lyrics of *Stairway to Heaven*).

² See Jimmy Brown, *The 50 Greatest Led Zeppelin Songs*, GUITAR WORLD (Jan. 9, 2015), archived at <http://perma.cc/942T-3JV7> (listing *Stairway to Heaven* as third greatest hit); *Readers Poll: The Best Led Zeppelin Songs of All Time*, ROLLING STONE (Oct. 10, 2012), archived at <http://perma.cc/8BUV-2GN3> (stating *Stairway to Heaven* was often listener's first introduction to Led Zeppelin and thereby winning best song); *The 40 Greatest Led Zeppelin Songs of All Time*, ROLLING STONE (Nov. 7, 2012), archived at <http://perma.cc/ZZV7-AGUE> (ranking Led Zeppelin's great songs, listing *Stairway to Heaven* as number two).

³ See Jerry Shriver, *Led Zeppelin unearths new view of 'Heaven'*, USA TODAY (Oct. 27, 2014), archived at <http://perma.cc/S5XY-5KJ5> (suggesting Led Zepp-

artists, the end product enters this world, being heard in restaurants, on the radio, on television, in movies and in concerts, to name a few, enabling listeners to enjoy the music.⁴ Historically, music was only available through live performance and slowly entered commerce with the invention of radio and vinyl.⁵ Today, music is more frequently listened to as a result of iTunes and Internet radio and streaming programs such as Spotify and Pandora Radio.⁶ Copyright law acknowledged the need to protect musical works and eventually sound records, however, copyright has yet to find a way to cater to the unique attributes of the music business.⁷

Successful composers have the ability to enjoy and benefit from their work for many years.⁸ This is largely because listeners en-

lin's hits were on the top ten Billboard album chart back in the 1970s along with 2014 with the band's re-release campaign).

⁴ See *Company Info*, AUDIO SPARX, archived at <http://perma.cc/TA9N-QRWL> (describing digital audio licensing in the movie and television industry); see also Claire Suddath, *How Music at the Office Affects Your Work Life*, BLOOMBERG (Nov. 8, 2012), archived at <http://perma.cc/C82Z-NRSV> (suggesting that while background music is more often than not present in a business environment, it may also have benefits to working efficiently); *What is SiriusXM?*, SIRIUSXM SATELLITE RADIO, archived at <http://perma.cc/6EUF-PE28> (explaining the services of SiriusXM satellite radio); *Why ASCAP Licenses Bars, Restaurants & Music Venues*, ASCAP (Oct. 2, 2013), archived at <http://perma.cc/7PQY-2RX7> (noting how music often sets the atmosphere at restaurants, bars, and other settings).

⁵ See *An Audio Timeline*, AUDIO ENGINEERING SOCIETY, archived at <http://perma.cc/AG56-N268> (displaying a timeline of audio technology and development).

⁶ See Amadou Diallo, *Quest For The Perfect Playlist: iTunes Radio, Pandora And Spotify*, FORBES (Sept. 24, 2013), archived at <http://perma.cc/E2K9-YWDK> (observing the use of three top web based radio stations, Pandora, Spotify, and iTunes radio); see also Brandon Giggs & Todd Leopold, *How iTunes Changed Music, and the World*, CNN TECH, archived at <http://perma.cc/9CJU-C8Y9> (defining the impact of iTunes on music sales in the late 2000s).

⁷ See Debra Presi Brent, *The Successful Music Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 233 (1990) (highlighting the various problems with music in copyright infringement suits).

⁸ See Peter Dicola, *Money From Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 342-43 (2013) (finding musicians are able to rely on revenue streams to earn a living on their creativity); see also Zoe Chace, *How Much Does it Cost to Make a Hit Song?*, NPR (June 30, 2011), archived at <http://perma.cc/D6PG-Q3ZL> (itemizing the cost of recording, producing, and marketing a hit song); Steve Knopper, *The New Economics of the Music Industry*, ROLLING STONE (Oct. 25, 2011), archived at <http://perma.cc/AMH2-JQAQ> (assessing the economic breakdown of the music industry in 2011, covering sales, internet radio, and YouTube); *myMUSICRoyalties*,

joy present day culture as well as tunes from decades ago.⁹ Online music applications, such as iTunes and Amazon, provide the ability to purchase a single or album, regardless of what year it was released.¹⁰ In essence, music that was composed and released forty years ago can still be purchased today by millions of people with ease.¹¹ Consequently, a composer who believes and invests in her composition can be sued forty years later for copyright infringement.¹²

ALLIANCE OF ARTISTS AND RECORDING COMPANIES, *archived at* <http://perma.cc/N899-HUYF> (describing the different forms of royalties in the music industry); *Research Reports*, RIAA, *archived at* <http://perma.cc/MZA9-H39T> (listing background information on their financial services to support musicians); Stephen Sheffer, *They Made How Much??? Top Grossing Music Tours Of 2014*, WXRT (Dec. 5, 2014), *archived at* <http://perma.cc/Q7PJ-YASR> (highlighting the most monetarily successful music tours of 2014).

⁹ See Ronald E. Riggio, *Why Do Young People Listen to Really Old Rock Music?*, PSYCHOLOGY TODAY (Aug. 1, 2014), *archived at* <http://perma.cc/FP6Y-7GCA> (suggesting classic rock continues to be enjoyed forty years later). The author provides five explanations for why classic rock has sustained in popularity. *Id.* He first suggests that generation y and millennials benefited from engaged parents who exposed them to the music of their youth. *Id.* He next proposes that the music of the 1960s and 1970s were “culturally enshrined”, meaning the music that came out of this time period significantly shaped the American culture. *Id.* The third reason may be up for interpretation, however the author asserts that musicians of the ‘60s and ‘70s were “truly talented.” *Id.* Although this could be considered biased, Riggio admits that millennials feel the same sentiment. He equates the talent of the ‘60s and ‘70s to that of the Baroque period in music history. *Id.* His fourth explanation is that the Baby Boomers have a strong presence in the media industry, as evidenced by the movie soundtracks. *Id.* Lastly, Riggio proposes that the music industry “filters” oldies so that only hits are heard on the radio or on soundtracks while newer music has not benefited from filtering and therefore is often less memorable. *Id.*

¹⁰ See *CDs & Vinyl*, AMAZON.COM, *archived at* <http://perma.cc/XGZ9-TD4K> (pointing to a leading website where consumers can purchase tangible CDs and Vinyl sound recordings); see also *Digital Music*, AMAZON.COM, *archived at* <http://perma.cc/8BPL-XP9S> (providing an online database to purchase digital downloads of music singles and albums); Giggs & Leopold, *supra* note 6 (observing online music stores allowed the user to buy single songs, celebrating the single, rather than the album as a whole); *Prime Music*, AMAZON.COM, *archived at* <http://perma.cc/8QYR-UVHX> (illustrating the music library available for Amazon Prime members).

¹¹ See Giggs & Leopold, *supra* note 6 (recognizing Beatles’ collaboration with iTunes in 2010).

¹² See Oliver Hertzfeld, *Spirit v. Led Zeppelin: Analysis Of The “Stairway To Heaven” Infringement Lawsuit*, FORBES (May 21, 2014), *archived at*

“The artistic world has developed its own informal rules for borrowing.”¹³ Composers for centuries used pre-existing music as inspiration for their creative process.¹⁴ Inspiration is natural and encouraged, be it in fashion, art, authorship or composition.¹⁵ Where it may be easier to distinguish the author’s expression from the non-copyrightable “idea,” it is more complicated in music where the average listener cannot easily distinguish the “idea” from the expression.¹⁶ Yet musicians are sued for copyright infringement because their songs sound substantially similar, and consequently, due to the nature of the music industry, “infringements” are often continuous in nature and thus subject to an indefinite statute of limitations.¹⁷ Lach-

<http://perma.cc/P934-DA3K> (describing delayed copyright infringement suit against Led Zeppelin).

¹³ See J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 426 (2004) (quoting Aaron Keyt, *An Improved Framework for Music Plagiarism*, 76 CAL. L. REV. 421, 422 (1988)).

¹⁴ See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 46-47 (2015) (elaborating on examples of artists and inventors who create based on inspiration from others); see also Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. REV. 547, 614-18 (2006) (examining how various cultures borrow from one another in their compositional process); Keyes, *supra* note 13, at 428-29 (describing jazz as a genre of music that traditionally is founded on borrowing “pre-existing musical material and then improvising on it”).

¹⁵ See SILBEY, *supra* note 14, at 26, 29, 33 (introducing stories of inspiration from creators in a variety of mediums). Inspiration is not only evident in the initial creation of an expression but further encouraged by the exclusive right to prepare derivative works. *Id.* See also Arewa, *supra* note 14, at 571-72 (discussing the exclusive right to prepare derivative works and the tensions associated with the compositional process in music).

¹⁶ See Michelle V. Francis, Comment, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter – A More Comprehensive Use of Expert Testimony and the Implementation of an “Actual Audience” Test*, 17 PEPP. L. REV. 493, 500 (1990) (recalling difficulties in separating the idea from the expression because music is perceived through sound); see also Eliot Van Buskirk, *Music Bloodline Web App Traces Bands’ Influence on Each Other*, EVOLVER.FM (Nov. 7, 2011), archived at <http://perma.cc/N85L-NLD7> (illustrating the natural tendency to compose under the influence of other musicians).

¹⁷ See Jaime Walsh, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DEPAUL-LCA J. ART & ENT. L. 261, 263-74 (2006) (listing various music copyright lawsuits occurring over whether songs sounded substantially similar); see also David May, Note, “*So Long As Time Is Music*”: *When Musical Compositions are Substantially Similar*, 60 S. CAL. L. REV. 785, 790-91 (1987) (elaborating on factors contributing towards songs sounding substan-

es, an equitable defense, may bar a suit for undue delay.¹⁸ Until recently, there was conflict as to whether laches was available in copyright disputes, however the landscape of copyright defenses changed after the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer*.¹⁹

This Note examines the role of the statute of limitations within the context of copyright law and whether it lives up to its purpose in regards to protecting musical works and sound recordings. Part II will journey through the history of the music copyright and the exclusive rights provided to the copyright holder.²⁰ Part II will also provide background to the equitable defense of laches formally available to copyright holders.²¹ Part III will discuss the current infringement claim against Led Zeppelin and the recent Supreme Court decision *Petrella v. Metro-Goldwyn-Mayer, Inc.*²² Finally, Part IV will reflect on the *Petrella* decision, how it affects the music industry within the copyright context, and whether music should be treated differently.²³

II. HISTORY

A. Copyright Protection of Musical Works and Sound Recordings

Although copyright protection originated as a common law tradition inherited from British law, today copyright protection is

tially similar which gives rise towards a lawsuit); Daniel Sheerin, Note, "You Never Got Me Down, Delay": *Petrella v. Metro-Goldwyn-Mayer, Inc. and the Availability of Laches in Copyright Infringement Brought within the Statute of Limitations*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 851, 892 (2014) (distinguishing discrete acts of infringement from those that are continuous, often occurring from the re-release of a particular album or film or the production of derivative works).

¹⁸ See *Laches*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim").

¹⁹ See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014) (reversing the lower courts' approval of laches to bar adjudication of a copyright claim brought within the three year statute of limitations).

²⁰ See *infra* Part II.

²¹ See *infra* Part II.

²² See *Petrella*, 134 S. Ct. at 1962; see also *infra* Part III.

²³ See *infra* Part IV.

granted as a federal body law.²⁴ The founding fathers valued intellectual growth and creativity, and included within the body of the United States Constitution the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁵ Originally, this clause did not protect music from unlawful copying as music functioned differently within society from how it does today.²⁶ For example, until the advent of radio and the sound recording, the only means of performing and listening to music was through live performance, either by gathering around the piano at home or by attending concerts.²⁷

²⁴ See WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 8.1 (2015) (defining the scope of the first copyright law in England). Enacted in 1710, copyright protection aimed to address the early needs of English authors. With the passing of this law, the British Parliament recognized authors as the true owner of the work and had the right to make and distribute copies of the book. *Id.* See IP3-IP3-5 BUSINESS LAW MONOGRAPHS § 5.01 (2015) (summarizing the development of British copyright law); see also *The Statute of Anne, 1710*, THE HISTORY OF COPYRIGHT, archived at <http://perma.cc/Q3G5-8NNV> (displaying a copy of the first copyright statute in world history, dating back to 1710).

²⁵ See U.S. CONST. art. I, § 8, cl. 8 (pointing to the text granting Congress the power to provide copyright and patent protection). This clause is often referred to by several names, such as the “Intellectual Property Clause,” the “Patent and Copyright Clause,” and the “Progress Clause.” *Id.* See also Christine McCarroll, Note, *Morals, Movies, and the Law: Can Today’s Copyright Protect a Director’s Masterpiece from Bowdlerization?*, 5 J. HIGH TECH. L. 331, 332 (2005) (elaborating on the origin of U.S. copyright law); Kristin Bergman, *The Text and History of the Patent and Copyright Clause of the U.S. Constitution*, CONSOURCE, archived at <http://perma.cc/H8MQ-HAL8> (indicating the source of power to provide intellectual property rights in patent and copyright).

²⁶ See Copyright Act of 1790, COPYRIGHT.GOV, archived at <http://perma.cc/VBP6-KW6F> (providing text of the original United States Copyright Act). According to the original statute, copyright protection was limited to charts, maps, and books. *Id.* See also *United States Copyright Office: A Brief Introduction and History*, COPYRIGHT.GOV archived at <http://perma.cc/9XPH-3WS4> [hereinafter *United States Copyright Office*] (offering a timeline of significant actions affecting the copyright law). Dramatic works were given copyright protection in 1856. Copyright did not take long to include film, including “motion pictures” as copyrightable subject matter in 1912. Architectural works were granted protection in 1972. It was not until 1984 when copyright law finally recognized sound recordings. *Id.* See Keyes, *supra* note 13, at 410 (describing the role of music in the American family in the early 1800s).

²⁷ See Keyes, *supra* note 13, at 410 (examining the role of music in family units in the 1800s).

With improvisation as the exception, musicians' utilized printed sheet music, which was only available from music publishers and sold alongside books and magazines.²⁸ By 1831, there was an increasing demand to recognize printed sheet music as its own form rather than as a literary text and due to the efforts of music publishers, Congress revised the Copyright Act.²⁹ As a result, "musical works," sheet music including both lyrics and music, was ultimately recognized as a new subject matter protected from unauthorized printing.³⁰

As the landscape of American society changed, so did music.³¹ Music was no longer limited to professional musicians, as music lessons became increasingly popular and sales of sheet music skyrocketed.³² Composers saw value in the performance of their works and sought an exclusive right to public performance.³³ On January 6, 1897, Congress provided protection against unauthorized public performances.³⁴

²⁸ See Keyes, *supra* note 13, at 410 (explaining the function of music in the American household in the 19th Century). During this time, music publishers did not operate as they do today. *Id.* In addition to classical music publishers, sheet music was also obtained music storeowners and local printing shops. *Id.* Sheet music was viewed similarly to literary texts, often sold side by side, sold by traveling salesman or shops owned by music publishers. *Id.*

²⁹ See Keyes, *supra* note 13, at 411 (inferring composers lobbied to have exclusive rights for musical works and effected changed in the law); see also *United States Copyright Office*, *supra* note 26 (identifying the point in history in which the Copyright Act was revised).

³⁰ See Keyes, *supra* note 13, at 411 (demonstrating the emergence of copyright protection over a musical composition). A "musical work" or "musical composition" refers to the sheet music to which music is transcribed. *Id.* It was not until many years later after the advent of the phonograph where musical recordings were granted protection. *Id.* See also COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, COPYRIGHT.GOV, archived at <http://perma.cc/X9SV-AXBB> (distinguishing between two forms of music for copyright protection: musical work and sound recording).

³¹ See Keyes, *supra* note 13, at 412 (recognizing the effects of social change on music industry).

³² See Keyes, *supra* note 13, at 412 (illustrating the popularity of music in the everyday household). The number of students studying piano increased dramatically and the piano became a popular item in a family's home. *Id.*

³³ See Keyes, *supra* note 13, at 413 (addressing musician's desire to capitalize on a new revenue stream).

³⁴ See *United States Copyright Office*, *supra* note 26 (articulating the date musical works were granted the exclusive right of public performance); see also 17 U.S.C. § 101 (2012) (articulating statutory definitions of "to perform" and "to perform or

By the mid 20th century, music took on a new role in American society.³⁵ From the household radio and restaurant jukebox to personal audio devices, the value of the sound recording boomed.³⁶ Despite the prevalence of sound recordings during the '50s and '60s, it wasn't until February 15, 1972 when a limited right in sound recordings was added to the Copyright Act.³⁷

On October 19, 1976, the Copyright Act underwent another major revision, resulting in the Copyright Act of 1976.³⁸ The Copyright Act of 1976 gave copyright owners six exclusive rights: the reproduction right, the right to prepare derivative works, the right of distribution, the right to publically perform, the right to publically display, and limited to sound recordings, the right to perform by

display a work 'publically'). Section 101 of the Copyright Act defines "to perform" as a "means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture of other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." "To perform or display a work 'publically'" is defined as:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.

See 17 U.S.C. § 101.

³⁵ See Keyes, *supra* note 13, at 417-19 (encapsulating the evolution of music from the 1950s to the 2000s).

³⁶ See Keyes, *supra* note 13, at 417-18 (summarizing how advancements in technology resulted in a culture immersed in music). Beginning with the radio and sound recording technology, the rock 'n roll era boomed throughout the 1950s, permeating into the family household and schools. *Id.* By the 1960s, television capitalized on this sudden popularity and aired music and dance shows. *Id.* It is not surprising that this boom resulted in a higher percentage of copyright disputes than previously experienced. *Id.*

³⁷ See *United States Copyright Office*, *supra* note 26 (identifying the date when sound recordings were recognized by the Copyright Act); see also Anna Shapell, Note, "Give Me a Beat:" *Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 523-24 (2012) (noting treatment of copyright rights in sound recordings remains unsettled).

³⁸ See 17 U.S.C. §§ 101-1332 (2012) (codifying the copyright law); see also *United States Copyright Office*, *supra* note 26 (pointing to the fourth general revision of the Copyright Act).

means of digital audio transmission.³⁹ These rights are subject to the “idea/expression dichotomy,” providing that only the expression of the idea may be protected while the idea remains in the public domain for all to use.⁴⁰ As long as no exception pertains, anyone infringing on these exclusive rights may find himself or herself subject to a lawsuit.⁴¹

Assertion of rights in one’s copyright can be brought against a party for improper use of any of the exclusive rights that pertain to that copyright; an assertion of rights most commonly involves a vio-

³⁹ See 17 U.S.C. § 106 (listing the exclusive rights in copyrighted works). A musical work is granted five exclusive rights: the right of reproduction, the right to prepare derivative works, the right of distribution, the right to perform the work publicly, and the right to display the work. A sound recording, on the other hand, is granted four exclusive rights: The first three are the same as granted for a musical work. However, a sound recording is not granted the right to perform or be displayed publicly. Rather, a sound recording has the exclusive right to perform publicly by means of digital audio transmission. Thus, a copyright holder of both a musical work and sound recording has nine exclusive rights granted to it by the Copyright Act. *Id.* See also Rachel S. Leeds, Note, *Confronting Digital Technology: The Motion Picture Industry’s Battle with Online Piracy*, 5 J. HIGH TECH. L. 303, 306 (2005) (illustrating the relationship between the right of reproduction with the right of distribution); See also Glenn M. Schley, Note, *The Digital Millennium Copyright Act and the First Amendment: How Far Should Courts Go to Protect Intellectual Property Rights?*, 3 J. HIGH TECH. L. 115, 120 (2004) (commenting on the exclusive rights provided by the Copyright Act).

⁴⁰ See 17 U.S.C. § 102(b) (stating “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”); see also *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (upholding the idea/expression dichotomy applying to all copyrightable works, allowing the public to freely build upon the ideas while providing exclusive rights to the expression); Abraham Drassinower, *Copyright is Not About Copying*, 125 HARV. L. REV. F. 108, 111 (2012) (explaining the “idea/expression dichotomy” as a doctrine which establishes copying a copyright owner’s ideas is not actionable). The “idea/expression dichotomy” can easily be seen through novels that have a similar theme. See, e.g., SUZANNE COLLINS, *THE HUNGER GAMES* (2008) (pointing to a modern novel regarding a dystopian society); WILLIAM GOLDING, *LORD OF THE FLIES* (1954) (providing an early example of a book about a dystopian society); LOUIS LOWRY, *THE GIVER* (1993) (illustrating a novel about a utopian society that becomes dystopian); VERONICA ROTH, *DIVERGENT* (2011) (identifying another distinct novel about a dystopian society).

⁴¹ See 17 U.S.C. §§ 501-504 (highlighting infringement and available remedies). Remedies include temporary and permanent *injunctions*, impoundment of infringing articles, and damages, either actual or statutory. *Id.*

lation of the first exclusive right, the right of reproduction.⁴² To prove infringement, the judge or fact finder must find ownership of a valid copyright, “copying in fact,” followed by “improper appropriation,” also known as “substantial similarity.”⁴³ First, copying in fact is *actual copying* and does not, on its own, constitute infringement.⁴⁴ Second, in order to find infringement, a fact finder must prove im-

⁴² See 17 U.S.C. § 501(a) (establishing a violation of an exclusive right constitutes infringement); see also 17 U.S.C. § 106(1) (defining the right of reproduction as “to reproduce the copyrighted work in copies or phonorecords”); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 821 (9th Cir. 2002) (illustrating a copyright infringement claim for improper appropriation of the Nicky Moonbeam book series, including the illustrations, text, and characters); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (providing early example of a music copyright infringement action); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (highlighting example where allegedly infringing work was similar only in the idea and therefore not infringing); *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706, 708 (S.D.N.Y. 1987) (describing the infringement action against Columbia Pictures for allegedly copying an illustration in the *New Yorker* to use as an advertisement for the film *Moscow on the Hudson*).

⁴³ See Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 277 (1993) (outlining the three elements to prove infringement: ownership of a valid copyright, access to the work allegedly infringed, and substantial similarity to the work allegedly infringed). Other forms of intellectual property differ in their requirements. See 35 U.S.C. § 102 (noting the requirement of “novelty” in patent law).

⁴⁴ See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (explaining the “access” element of copyright infringement as “an opportunity to view or to copy plaintiff’s work”). Access may not be inferred or assumed; however, circumstantial evidence may be admitted provided that there was a chain of events between the plaintiff’s work and the defendant’s access to that work or if the plaintiff’s work was widely disseminated. Proof of access through widespread dissemination, as noted by Judge Learned Hand, can be accompanied by the theory of subconscious access. *Id.*

Everything registers somewhere in our memoires, and no one can tell what may evoke it Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick.

Id. at 482-83 (quoted in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147-148 (S.D.N.Y. 1924)). In *Three Boys Music Corp.*, the Isley Brothers argued their song, “Love Is a Wonderful Thing,” was infringed by Michael Bolton in his hit, “Love is a Wonderful Thing”. *Id.* at 480. The court found merit in the plaintiff’s reasonable access argument and held the defendant liable. *Id.* at 484. See also *Selle v. Gibb*, 741 F.2d 896, 900-01, 905 (7th Cir. 1984) (holding that although the defendant’s work was strikingly similar, similarity alone does not constitute infringement).

proper appropriation.⁴⁵ This question asks if what was allegedly copied was substantially at the core of the original work.⁴⁶

As previously mentioned, ideas are not copyrightable; it is only the expression that can be granted copyright protection.⁴⁷ Thus, when conducting a substantial similarity analysis, to determine whether the work was improperly appropriated, the fact finder must be able to isolate both the idea and the expression from the point of view of an “ordinary lay observer,” asking whether an ordinary lay observer would recognize the alleged copy as being appropriated from the copyrighted work.⁴⁸

⁴⁵ See Jones, *supra* note 43, at 278 (pointing to the third element to prove copyright infringement, a finding of substantial similarity). Courts have developed a number of different tests in determining infringement. *Id.* Most notably is Judge Learned Hand’s ‘Abstraction Test’, which highlights what is not copyrightable (ideas, plots, general themes) from aspects that are (dialogue, descriptions, and word for word copying). See *Nichols*, 45 F.2d at 121 (explaining the abstraction test as a spectrum from word to word copying to abstract ideas). In addition to the abstraction test, courts apply the ‘ordinary lay observer test’, which asks what the ordinary observer would deem to be “too much similarity.” See *Steinberg*, 663 F. Supp. at 711 (describing the average lay observer standard in determining substantial similarity as a less stringent standard than the traditional ordinary lay observer); *Arnstein*, 154 F.2d at 473 (determining whether ‘lay listeners’ would find that the defendant misappropriated the plaintiff’s work). Similarly, courts have also applied an extrinsic – intrinsic test. In this test, courts use the extrinsic elements to filter the ideas from the expression, leaving intrinsic, copyrightable elements exposed. The ordinary lay observer then discerns whether those elements are substantially similar in its ‘total concept and feel.’ See *Cavalier*, 297 F.3d at 822-23, 826 (explaining the importance of identifying the unprotectable elements prior to analyzing whether the two works are substantially similar). Lastly, a court may apply a “more discerning observer” test when the work incorporates elements from the public domain. This test suggests the observer “look beyond the unprotected facts,” analyzing the arrangement and organization of the work. See *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272-73 (2d Cir. 2001) (contrasting the more discerning observer test from the ordinary lay observer test when the work is based largely on public domain elements).

⁴⁶ See *supra* note 45 and accompanying text (illustrating the idea expression dichotomy in copyright law).

⁴⁷ See *Drassinower*, *supra* note 40, at 111 (distinguishing the idea as copyrightable from the expression, which is not).

⁴⁸ See *supra* note 45 and accompanying text (providing examples of the ordinary lay observer standard).

B. Statute of Limitations in Music Copyright

A vast majority of civil claims have a statute of limitations, which is a federal or state law that restricts the amount of time a plaintiff can seek litigation.⁴⁹ Statutes of limitation function as a defense for a person served after an inappropriate amount of time.⁵⁰ Among other purposes, most relevant to this article, the statute of limitations provides the defendant peace of mind.⁵¹

Prior to 1957, federal copyright law did not recognize a uniform statute of limitations.⁵² Claims brought before the federal court utilized the applicable state statute of limitations, ranging from one to

⁴⁹ See FED. R. CIV. P. 8(c) (providing statute of limitations as a defense to federal civil claims); *Statute of limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "statute of limitations").

⁵⁰ See FED. R. CIV. P. 8(c) (listing statute of limitations as an available defense to a federal civil action); see also Brief for the Motion Picture Ass'n of America, Inc., et al. as Amici Curiae Supporting Respondents at 6, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (no. 12-1315) [hereinafter Brief for Respondents] (suggesting the statute of limitations is not only a defense for an untimely claim but an incentive for plaintiffs to be diligent in bringing suit).

⁵¹ See Ryan Christopher Locke, Note, *Resetting the Doomsday Clock: Is it Constitutional for Laches to Bar Copyright Infringement Claims within the Statute of Limitations?*, 6 BUFF. INTELL. PROP. L.J. 133, 138-42 (2009) (listing the elements of laches) (outlining the general functions of the statute of limitations). The statute of limitations also serves to prevent fraud by stopping prosecution of claims that involve lost or damaged evidence, test the merits of a claim "by encouraging diligent prosecution", and "enhanc[ing] commercial intercourse by preventing the disruption of litigation." *Id.*

⁵² See Brief of Southwestern Law Students Orly Ravid et al. as Amici Curiae Supporting Petitioner at 13, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (no. 12-1315) [hereinafter Brief for Petitioner] (describing the Congressional reasoning in creating a three-year statute of limitations after considering multiple state statutory durations). "The 'centralization of the movie industry' was cited to explain California's two-year tort statute of limitations, as compared to 'other states where the incident of copyright actions is low' and that have, consequently, 'applied longer periods for the commencement of the actions,' such as Wyoming's eight-year statute of limitations." See *id.* at 12. See Sheerin, *supra* note 17, at 861 (observing a weakness in the Copyright Act where there was a lack of control in determining a time limitation for bringing an infringement suit); see also Elizabeth T. Kim, Comment, *To Bar or not to Bar? The Application of an Equitable Doctrine Against a Statutorily Mandated Filing Period*, 43 U.C. DAVIS L. REV. 1709, 1715 (2010) (suggesting Congress addressed state tort statute of limitation durations in their consideration of creating a Federal copyright statute of limitations).

eight years.⁵³ In an effort to codify copyright infringement claims, Congress included a federal statute of limitations in the amended 1975 Copyright Act.⁵⁴ Section 507(b) of the Copyright Act states, “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”⁵⁵ This new law provided plaintiffs with copyright infringement claims a strict statute of limitations to bring a cause of action against the alleged infringer.⁵⁶

C. History of Laches: An Equitable Defense

The equitable defense of laches dates back to the fifteenth century in England,⁵⁷ based on the old English maxim “equity aids the vigilant, not those who sleep on their rights.”⁵⁸ The courts of equity were grounded in notions of fairness and flexibility, rather than a

⁵³ See Brief for Petitioner, *supra* note 52, at 11 (providing examples of various state statutes of limitations); see also Kim, *supra* note 52, at 1715 (reiterating the variety in statute of limitations among the states for tort claims).

⁵⁴ See 17 U.S.C. § 507(b) (providing a three-year statute of limitations for civil copyright claims).

⁵⁵ See *id.* (quoting the statutory language from the Copyright Act); see also S. REP. NO. 85-1014, at 1961-64 (1957) (providing the text of the Senate report proposing the establishment of a federal statute of limitations for copyright claims). At the time of this Senate report, the statute of limitations for criminal copyright claims was three-years. See *id.* at 1661-64.

⁵⁶ See 17 U.S.C. § 507(b) (illustrating the statutory text for the federal statute of limitations in the Copyright Act of 1976). Although this note only analyzes the civil suit, Congress also created a criminal copyright statute of limitations, § 507(a) which states: “Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.” See 17 U.S.C. § 507(a) (providing text to the criminal statute of limitations for copyright infringement).

⁵⁷ See Brief for Petitioner, *supra* note 52, at 6 (defining the origin of laches as dating to the old English court headed by the Chancellor ruling over matters of equity); see also Dylan Ruga, *The Role of Laches in Closing the Door on Copyright Infringement Claims*, 29 NOVA. L. REV. 663, 670 (2005) (exploring the historical background of laches in the British legal system in the thirteenth and fourteenth centuries).

⁵⁸ See Vikas K. Didwania, Comment, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227, 1229 (2008) (providing the English translation to the old maxim from which laches derives); see also Misty Kathryn Nall, Note, *(In)equity in Copyright Law: The Availability of Laches to Bar Copyright Infringement Claims*, 35 N. KY. L. REV. 325, 326 (2008) (noting the historical background of laches).

strict application of the law.⁵⁹ In an era in which a statute of limitations had yet to be developed, if a plaintiff waited an unreasonable time before initiating suit, laches was the only remedy a defendant could rely on to bar the claim.⁶⁰ The court of equity eventually merged with the court of law, but the concept of fairness lingered in the English courts.⁶¹

In the early eighteenth century, the American colonies adopted both the court of equity and the court of law, thus providing the colonies with equitable defenses.⁶² Due to procedural concerns between the different court systems, a movement began to unite both courts into one.⁶³ Unification was achieved in 1938 in the adoption of the *Federal Rules of Civil Procedure*,⁶⁴ stating “[t]here is one form of action - the ‘civil action.’”⁶⁵ While the rules include laches as an affirmative defense to a civil suit, the inclusion of equitable relief has caused uncertainty within the judicial system.⁶⁶ Early precedent il-

⁵⁹ See Ruga, *supra* note 57, at 670-71 (examining the history of the English bifurcated court system).

⁶⁰ See Brief for Petitioner, *supra* note 52, at 7-9 (addressing the appropriate circumstances where equitable defenses such as laches were available). Equitable defenses were historically addressed to claims held within the court of equity treating matters of “justice and fairness.” These defenses were also available when a remedy at law however was not available or scarce. See Brief for Petitioner, *supra* note 52, at 7-9. See Nall, *supra* note 58, at 327 (highlighting the historical use of laches as a defense to bar a claim prior to the formation of a statute of limitations).

⁶¹ See Ruga, *supra* note 57, at 670-71 (examining the British legal system in the thirteenth and fourteenth centuries). It was common for legal matters to go before the King, where in turn the matter would be turned over to a chancellor, hence the term “Court of Chancery.” *Id.* Presently, the American legal system retains one court of chancery in Delaware, dealing primarily in matters of corporate issues within Delaware corporations. See *Welcome to the Delaware Court of Chancery*, DELAWARE STATE COURTS, archived at <http://perma.cc/JD68-V6GR> (describing the nature of the Court of Chancery in Delaware).

⁶² See Nall, *supra* note 58, at 328 (pointing out the development of the merger of law and equity during the growth of the American legal system).

⁶³ See Ruga, *supra* note 57, at 671 (commenting on equity’s shortcomings, largely in part that it mirrored the British system too closely); see also Nall, *supra* note 58, at 328 (explaining the cause for the merger of equity in law into one court).

⁶⁴ See FED. R. CIV. P. 8 (listing affirmative defenses to a civil cause of action).

⁶⁵ See FED. R. CIV. P. 2 (quoting the Federal Rules of Civil Procedure).

⁶⁶ See FED. R. CIV. P. 8(c)(1) (listing laches as one of the affirmative defenses); see also Brief for Petitioner, *supra* note 52, at 7-8 (stating that the merger of equity and law has led to misapplications of equitable defenses); Ruga, *supra* note 57, at 671 (noting the difficulties in merging equity and law).

illustrates that equitable relief was appropriate in cases of equitable causes of action, such as an injunction.⁶⁷

The court recognized laches when the defendant could prove that the plaintiff knew of the violation but chose to withhold suit.⁶⁸ Additionally, the court considered three elements: “(1) whether there was a delay, (2) whether the delay unreasonable, and (3) whether the defendant was prejudiced.”⁶⁹ Due to the subjective nature of claiming delay, the court used an objective method in calculating delay; the delay began accruing when the plaintiff knew, or should have known, of the infringement.⁷⁰ Although the first element was based on an objective standard, the second element of unreasonableness remained subjective; the court found unreasonableness if a plaintiff delayed to take advantage of the defendant’s work and effort.⁷¹ The delay was reasonable, however, if a plaintiff delayed as a result of exhausting all “remedies through the administrative process” or in deciding whether the cost of litigation was worth bringing suit.⁷² Lastly, the

⁶⁷ See Ruga, *supra* note 57, at 671 (illustrating examples where the courts were comfortable in applying equitable relief). Despite any misgivings, courts felt comfortable allowing equitable relief for equitable claim. For example, in *Holmberg v. Armbrecht* 327 U.S. 392, 396 (1946), the Supreme Court distinguished the difference between equity and law, stating “equity has acted on the principle that ‘laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, - an inequity founded upon some change in the condition or relations of the property or the parties.’” See Ruga, *supra* note 57, at 666.

⁶⁸ See Sheerin, *supra* note 17, at 856-57 (explaining that it is necessary for the plaintiff to have knowledge of the infringement before the alleged delay in order for the defendant to assert the defense).

⁶⁹ See Locke, *supra* note 51, at 142 (listing the elements of laches); see also Sheerin, *supra* note 17, at 856-57 (explaining the three factors the court considers when deciding to approve or reject the laches defense); Jason R. Swartz, Comments and Casenotes, *When the Door Closes Early: Laches as an Affirmative Defense to Claims of Copyright Infringement*, 76 U. CIN. L. REV. 1457, 1460 (2008) (condensing the first two elements into one, “unreasonable delay”).

⁷⁰ See Sheerin, *supra* note 17, at 857 (outlining the court’s method in determining when delay begins).

⁷¹ See Sheerin, *supra* note 17, at 857 (summarizing the court’s considerations when determining whether a delay was unreasonable); see also Swartz, *supra* note 69, at 1461 (explaining unreasonable delay in terms of free riding of the defendant’s labor).

⁷² See Sheerin, *supra* note 17, at 857 (explaining situations where delay would not be considered unreasonable). While delay may be unreasonable, a copyright owner is not obligated to sue for every infringement he or she may know about. Therefore, it is reasonable if a copyright owner feels he or she is not financially able to

defendant had to show that the unreasonable delay resulted in prejudice.⁷³ This element derived from the purpose of laches within the court of equity where a claim was barred because it caused undue prejudice.⁷⁴ Regardless of the existence of an objective test, Judge Learned Hand stated:

It must be obvious to everyone familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.⁷⁵

bring suit when learning about the infringement or has difficulties administratively in bringing a claim. *Id.*

⁷³ See Sheerin, *supra* note 17, at 857 (describing an example of the unreasonableness factor of laches as when the plaintiff delays in order to capitalize on the defendant's work and profits in order to be awarded a larger sum); see also Swartz, *supra* note 69, at 1460-61 (suggesting the unreasonableness factor is determined by weighing case specific factors).

⁷⁴ See *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001) (describing that the very nature of an equitable defense concerns prejudice). The dispute in *Danjaq LLC* dates back forty years to the very beginning of the development of the James Bond character. There was no contention that Ian Flemming originated the character, yet once screen plays were written and developed, claims of copyright began to arise. At the core of this dispute was the treatment of the James Bond character in the *Thunderball* screen play. The alleged infringement at issue dated back to 1961, however, the plaintiff unreasonably delayed in evoking his right to sue. In result, the Court of Appeals affirmed the district court's allowance of laches in barring all claims. *Id.* at 948-50. See Brief for Respondents, *supra* note 50, at 16 (reiterating the consequences in litigation when a defendant experiences evidentiary and expectations-based prejudice); see also Sheerin, *supra* note 17, at 858 (explaining the variations of prejudice). Courts recognized two forms of prejudice: evidentiary and expectations-based. Evidentiary prejudice includes circumstances such as faded memories, lost or destroyed evidence, or other consequences suffered as a result of delay. Expectations-based prejudice involves a defendant to show he or "took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly. See Sheerin, *supra* note 17, at 858 (summarizing expectations-based prejudice which has resulted from a delay).

⁷⁵ See *Didwania*, *supra* note 58, at 1231 (articulating Judge Hand's opinion about when a copyright lawsuit should be brought by plaintiffs (quoting *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916))).

D. Other Equitable Limitations

The Federal Rules of Civil Procedure recognized additional equitable remedies available in the court of law.⁷⁶ Equitable estoppel, another available defense, was accessible to bar a claim in the event a defendant relied on a copyright plaintiff's dishonesty to his detriment.⁷⁷ Similar to laches, the primary purpose of the defense was to provide fairness and morality.⁷⁸ While estoppel originated in the common law courts of England, the concept of equity attached through the court of chancery in an effort to overthrow the British throne's approach, "might makes right."⁷⁹ Equitable estoppel was similarly developed to bar suit brought within the statute of limitations; however, the foundational requirements differed from laches; rather than undue delay and unfair prejudice, the defendant must have relied on a representation or conduct by the plaintiff and experienced injury to his detriment from that reliance.⁸⁰

Tolling, while not a defense, is an equitable doctrine available to a plaintiff to extend the duration to file suit under certain circumstances.⁸¹ Tolling lacks enumerated elements, however, it functions

⁷⁶ See FED. R. CIV. P. 8(c) (listing equitable estoppel, laches and duress as potentially available equitable affirmative defenses).

⁷⁷ See *Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining equitable estoppel as "a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way"). Equitable estoppel has been deemed to be closely related to laches as a defense although the required elements differ. *Id.* See *In re Searcy*, 333 B.R. 617, 624 (Bankr. D. Mass. 2005) (comparing equitable estoppel to laches in a bankruptcy dispute); see also JOHN BOURDEAU, ET AL., 5 CYC. OF FEDERAL PROC. § 15:505 (3d ed. 2015) (describing the close relationship between laches and equitable estoppel).

⁷⁸ See T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 388 (2008) (describing the governing principle of equitable estoppel).

⁷⁹ See *id.* at 384-85 (providing historical background of estoppel in England during the Enlightenment era).

⁸⁰ See *Petrella*, 134 S. Ct. at 1977 (summarizing the most serious elements of equitable estoppel as misleading behavior or statement and consequent loss to the defendant); see also *Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014) (indicating the elements required to assert equitable estoppel as a defense).

⁸¹ See *Equitable Tolling*, BLACK'S LAW DICTIONARY (10th ed. 2014) (inferring there are multiple circumstances in which a plaintiff may toll the statute of limitations); see also David E. Harrell, Comment, *Difficulty Counting Backwards from Three: Conflicting Interpretation of the Statute of Limitations on Civil Copyright*

quite similarly to laches.⁸² Equitable tolling originates as an equitable tool that the plaintiff may use when justice requires it.⁸³

Lastly, the separate accrual rule and the continuing wrong doctrine are limitations existing within the statute of limitations in the event of successive violations.⁸⁴ The separate accrual rule considers each violation a new cause of action, thus triggering the three-year statute of limitations.⁸⁵ The continuing wrong doctrine, as an alternative, treats successive violations as one continuous violation and does not trigger the statute of limitations until the continuing wrong ends.⁸⁶ As a result, these doctrines constrain the amount of relief a plaintiff may recover in circumstances involving continuous infringements.⁸⁷

E. The conflict between laches and the statute of limitations in copyright infringement suits

Until June 2014, circuits remained split as to whether laches was a viable defense to a copyright infringement claim.⁸⁸ Although

Infringement, 48 SMU L. REV. 669, 675 (1995) (suggesting equitable tolling may coexist with a statute of limitations).

⁸² See Nall, *supra* note 58, at 343 (commenting on the Seventh Circuit's comparison of laches and tolling).

⁸³ See Sheerin, *supra* note 17, at 889 (observing the similar equitable nature of laches and tolling).

⁸⁴ See HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 16:18 (2015) (outlining the two processes of determining when an infringement accrues in the event of a series of infringements); see also Sheerin, *supra* note 17, at 862-63 (describing and differentiating the continuing wrong doctrine from the rolling statute of limitations).

⁸⁵ See ABRAMS, *supra* note 84 (explaining the application of the separate-accrual rule).

⁸⁶ See ABRAMS, *supra* note 84 (highlighting the application of the continuing wrong doctrine).

⁸⁷ See Sheerin, *supra* note 17, at 892 (explaining the three-year look back period when applying the separate-accrual rule). A court adopting the rolling statute of limitations calculates the trigger for the statute of limitations by applying the separate accrual rule whereas the continuing wrong doctrine looks to whether the last violation occurred within the past three years. See *id.* at 862-63.

⁸⁸ See Sheerin, *supra* note 17, at 865-85 (identifying the circuits that most significantly contrast with each other in the matter of laches); see also Swartz, *supra* note 69, at 1464-72 (examining five circuits' stance on laches as a defense for copyright infringement claims); *Court Locator*, UNITED STATES COURTS, archived at <http://perma.cc/YL5S-NQ33> (identifying the geography of the United States circuit courts).

most circuits recognized laches to a degree, the Fourth Circuit rejected the defense.⁸⁹ In *Lyons Partnership v. Morris Costumes, Inc.*,⁹⁰ the court rejected the idea of approving a judicially created defense over the congressionally created statute of limitations.⁹¹ In opposition to laches, the court found strength in the Copyright Act itself which states, “[n]o civil action shall be maintained under the provisions of this Title unless it is commenced within three years after the claim accrued.”⁹² This holding affirmed the idea that laches does not co-exist with the statute of limitations but rather is replaced if such limitation exists.⁹³

While only one circuit completely discarded the defense, the Eleventh Circuit was not far behind, allowing for laches only in the “most extraordinary circumstances.”⁹⁴ Similarly, the Sixth Circuit

⁸⁹ See Sheerin, *supra* note 17, at 865 (illustrating that although the district court found that the delay was “inexcusable”, the appellate court outright rejected the defense). In *Lyons*, the plaintiff became aware of the defendant’s infringing actions in regards to the plaintiff’s copyright in “Barney.” The Fourth Circuit barred laches as a defense holding that a four-year delay between knowledge of the infringement and bringing suit was not an “inexcusable” delay. See Sheerin, *supra* note 17, at 865. See Swartz, *supra* note 69, at 1464 (explaining the Fourth Circuit’s position as exemplified in *Lyons P’ship v. Morris Costume*).

⁹⁰ See *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 806 (4th Cir. 2001) (holding laches unavailable as equitable remedy to bar damages for a copyright claim brought within the statute of limitations). This copyright case revolved around the character “Barney,” asserting ownership rights against a costume manufacturer who manufactured and sold a similar looking purple dinosaur costume. *Id.* at 794. The district court found infringement, however, due to a four-year delay in filing a lawsuit, the court held laches barred monetary relief. *Id.* at 796-97. On appeal, the court reversed the lower court’s holding on laches, rejecting laches as a defense to bar suit within the statute of limitations time period. *Id.* at 806.

⁹¹ See *id.* at 806 (holding the trademark and copyright suit over television character “Barney” was not barred by laches or the statute of limitations); see also *Separation of Powers – an Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES, archived at <http://perma.cc/JNZ3-YQDF> (explaining the roles of the three branches of government and suggesting that the powers occasionally overlap often resulting in competition and conflict).

⁹² See *Lyons P’ship, L.P.*, 243 F.3d at 798 (suggesting that the presence of a statute of limitations in the copyright statute outweighs equitable relief).

⁹³ See *id.* (observing that Congressional statutory remedies outweigh judicially created ones); see also Sheerin, *supra* note 17, at 885 (elaborating on the Supreme Court’s discomfort in allowing judicially created remedies over statutory based law).

⁹⁴ See Sheerin, *supra* note 17, at 867-89 (examining how the Eleventh Circuit resulted in allowing laches for retrospective relief in extraordinary circumstances by balancing that of the reasoning of the Fourth and Fifth Circuits). The Tenth Circuit

only accepted laches in “the most compelling of cases.”⁹⁵ The Second Circuit acknowledged laches to bar injunctive relief, however, similar to the Sixth Circuit, it was unavailable to defend against a claim for monetary relief.⁹⁶ While the Seventh Circuit did not speak much in the copyright context, *Teamsters & Employers Welfare Trust v. Gorman Brothers Ready Mix*⁹⁷ commented on the effect of laches in regards to claims of equity versus law.⁹⁸ The court compared laches and equitable estoppel, which “lets a plaintiff extend the statute of limitations period due to some action by the defendant that

used a similar standard, allowing laches in rare cases that cause extreme undue prejudice to the defendant. *Id.* at 871. In *Jacobson v. Deseret Book Co.*, a book publisher published a book that appeared to be the same, if not incredibly similar to, the personal memoirs of the plaintiff, a prisoner of war during World War II. *See* 287 F.3d 936, 940-41 (10th Cir. 2002) (holding laches was unavailable under the particular facts, however in distinguishing the facts from another case raised by the defense, the court left open the possibility of allowing laches, being determined on a case-by-case basis); *see also* Sheerin, *supra* note 17, at 871 (inferring a factual inquiry is necessary before granting laches as a defense within the 10th Circuit).

⁹⁵*See* Swartz, *supra* note 69, at 1470 (commenting on a copyright dispute over architectural designs). The Sixth Circuit permitted laches to bar the copyright claim as it not only caused undue prejudice to the defendant, but also affected innocent third parties who resided in the condominiums. *See* *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 227 (6th Cir. 2007) (holding that although laches barred the claim, the court noted that laches would not apply to a claim seeking monetary damages, only to the extent of barring the destruction the copyrighted work). In *Chirco*, the plaintiff filed suit in 2001 claiming copyright infringement of his architectural plans for a condominium building. *Id.* at 228. After requesting and receiving the copied plans from the defendant, the plaintiff took no action. *Id.* at 230. Two years later, the plaintiff filed a second claim against the defendant, after numerous units were constructed, sold, and occupied. *Id.* at 234-35.

⁹⁶*See* Sheerin, *supra* note 17, at 875, 893-894 (holding that laches was permitted in to bar injunctive relief due to the consequences of such relief would result in total destruction of the work).

⁹⁷*See* Swartz, *supra* note 69, at 1468-69 (demonstrating the Seventh Circuit’s disregard to distinguishing between claims based on equity or law).

⁹⁸*See, e.g.,* *Teamsters & Emp’rs Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881-82 (7th Cir. 2002) (analogizing laches to other equitable doctrine such as equitable estoppel, currently recognized by the courts); *see also* Swartz, *supra* note 69, at 1468-69 (illustrating a strong example of laches and its concurrent role with statute of limitations outside of the copyright realm). Despite allowing a laches defense, the court in *Teamsters* did address concerns about overstepping congressional rights. *See* Swartz, *supra* note 69, at 1469.

made the plaintiff reasonably believe there was more time to bring the suit.”⁹⁹

The Ninth Circuit, however, previously embraced laches as a defense within the statute of limitations period barring all relief.¹⁰⁰ Often dubbed the home of America’s entertainment industry, it is ironic that this circuit appeared to be the least friendly to plaintiffs in copyright disputes.¹⁰¹ The leading case, *Danjaq L.L.C. v. Sony Corp.*¹⁰² affirmed the district court’s holding, allowing laches to bar the defendant’s counterclaim after the court was presented with “overwhelming and uncontroverted evidence of substantial prejudice due to McClory’s delay.”¹⁰³ Here, the Ninth Circuit applied a flexible approach to the scope of laches, holding that it can bar both prospective and retrospective relief.¹⁰⁴ This is significant in an industry that has sequels, re-releases, and even sound recordings.¹⁰⁵ The court noted:

⁹⁹ See Swartz, *supra* note 69, at 1468-69 (commenting that laches is the “mirror image” of equitable estoppel).

¹⁰⁰ See Nall, *supra* note 58, at 339 (comparing the Sixth Circuit’s limitation on laches to barring only equitable relief with the Ninth Circuit’s more expansive view allowing laches to bar both equitable and legal claims); see also Sheerin, *supra* note 17, at 880 (elaborating on the allowance of prospective relief). The Ninth Circuit “limited this holding to instances where ‘a special case that arises only when we know in advance that the defendant will be substantially prejudiced in its ability to defend future claimed infringements in just the same way it was prejudiced with regard to prior alleged infringements.’” See Sheerin, *supra* note 17, at 880 (quoting *Danjaq L.L.C. v. Sony Corp.*, 263 F.3d 942, 960 (2001)); see also Swartz, *supra* note 69, at 1466-67 (pointing to the Ninth Circuit barring both past and future claims for unreasonable delay and prejudice, allowing not only retrospective but additionally prospective relief).

¹⁰¹ See Sheerin, *supra* note 17, at 878 (quoting dicta from the Ninth Circuit’s holding in *Petrella*, “[o]ur circuit is the most hostile to copyright owners of all the circuits”).

¹⁰² See *Danjaq LLC*, 263 F.3d at 947 (adjudicating copyright claims regarding the James Bond character and screen play).

¹⁰³ See *id.* at 950 (holding that the delay and prejudice was so extraordinary that laches was appropriate despite the statute of limitations); see also Ruga, *supra* note 57, at 667 (summarizing the Court of Appeal’s reasoning in *Danjaq* on allowing laches to bar all claims).

¹⁰⁴ See *Danjaq LLC*, 263 F.3d at 959 (opining that the application of laches is flexible and may be applied to prospective relief).

¹⁰⁵ See *id.* at 960 (indicating the consequences of impending identical infringements).

that this bar to suit has little to say out the laches defense generally; rather, it is a special case that arises only when we know in advance that the defendant will be substantially prejudiced in its ability to defend future claimed infringements in just the same way that it was prejudiced with regard to prior alleged infringements.¹⁰⁶

III. FACTS

A. Laches no longer a viable defense in copyright claims

On May 19, 2014, The Supreme Court of the United States held in *Petrella* that the equitable defense of laches was not available to preclude litigation for a claim of copyright infringement brought within the three-year statute of limitations period.¹⁰⁷ In 2009, Paula Petrella brought suit against Metro-Goldwyn-Mayer, Inc. (“MGM”) alleging that the use, production, and distribution of the 1980s film *Raging Bull* violated, and continued to violate, her copyright in her father’s 1963 screenplay.¹⁰⁸ After properly renewing the 1963 screenplay in 1991, Petrella’s attorney informed MGM of her rights in the screenplay and that any “exploitation of any derivative work, including *Raging Bull* . . . infringed on the copyright now vested in [her].”¹⁰⁹

¹⁰⁶ See *id.* (discussing the court’s opinion in defending future claim infringements).

¹⁰⁷ See *Petrella*, 134 S. Ct. at 1978 (concluding the statute of limitations prevails over equitable remedies in copyright infringement lawsuits). This holding does not appear to be a complete bar. See *id.* at 1977 (leaving open two possibilities where delay may be considered).

¹⁰⁸ See *id.* at 1971 (establishing which claims Paula Petrella brought against MGM). This case arose out from one of three copyrights held by Frank Petrella regarding the motion picture *Raging Bull*. Frank Petrella was the sole author and copyright holder of two screenplays, one registered in 1963 and the other in 1970 and a book registered in 1973. Prior to his death, he assigned the screenplay to Chartoff-Winkler Productions along with the renewal rights and two years later, a subsidiary of MGM, United Artists Corporation, acquired the motion picture rights from the book and both screenplays. MGM released the film *Raging Bull*, a film based on the life of Jake LaMotta, a champion boxer. MGM believed they had full rights to make the film, placing much effort and investment into the film; MGM hired Martin Scorsese to direct and actor Robert De Niro to play LaMotta. *Id.* at 1969-71.

¹⁰⁹ See *id.* at 1971 (pointing to the moment when Ms. Petrella learned about her exclusive rights in her copyright). In 1990, the Supreme Court held that if an author dies before the renewal period, and she had already assigned her rights away, the

MGM moved for summary judgment on the grounds that the claim was barred by laches.¹¹⁰ The United States District Court for the Central District of California granted MGM's motion for summary judgment agreeing that laches barred the lawsuit.¹¹¹ The District Court specifically found that MGM experienced "expectations-based prejudice" because they expended significant funds and time creating and promoting the film.¹¹² Additionally, the court found that MGM experienced evidentiary prejudice because Mr. Petrella had passed away and Mr. La Motta, the boxer whose life was portrayed in the screenplay and film, was suffering from memory loss in his old age.¹¹³

The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's granting of summary judgment based on a laches defense.¹¹⁴ Here, the Court of Appeals focused on Petrella's reason for delaying suit, implying that she intentionally delayed because the film had not made money during those past years.¹¹⁵ The court detected that "[i]f any part of the alleged wrongful conduct occurred outside the limitations period, courts presume that the plaintiff's claims are barred by laches."¹¹⁶ Therefore, because Petrella was aware of earlier infringements outside of the limitations period, there was a presumption that her claim was barred by laches.¹¹⁷ Furthermore, the court found that MGM faced expectations-based prejudice

assignee may only be allowed to continue to use the original work if the author's successor transfers the renewal rights to the assignee. *Id.* at 1968. Ms. Petrella learned of this decision and hired an attorney to renew the rights in the 1963 screenplay. *Id.* at 1971. The 1973 screenplay and 1970 book were not renewed in a timely manner and therefore were not subject to this lawsuit. *Id.*

¹¹⁰ *See id.* at 1971 (stating that an eighteen year delay was unreasonable and prejudicial).

¹¹¹ *See id.* at 1971 (declaring the district court's acknowledgement of laches via its granting of summary judgment in favor of MGM).

¹¹² *See id.* (focusing on the District Court's weighing of laches versus the questions of material fact, which ordinarily would reject summary judgment).

¹¹³ *See Petrella*, 134 S. Ct. at 1972 (observing the presence of both expectations-based and evidentiary prejudice).

¹¹⁴ *See id.* (affirming the District Court's approval of summary judgment in favor of the defendants).

¹¹⁵ *See id.* (suggesting the motive for delaying suit was to capitalize on monetary relief).

¹¹⁶ *See id.* at 1972 (quoting the Court of Appeals' opinion).

¹¹⁷ *See id.* (inferring that laches was appropriate in part due to the knowledge of earlier infringements).

on the premise that the defendants had ownership and control of the film.¹¹⁸

Despite the Ninth Circuit's affirmation that laches, as a defense to a copyright infringement claim being brought after an unreasonable delay, was a reliable defense, Petrella filed another appeal and the Supreme Court granted certiorari.¹¹⁹ It appeared after oral arguments that laches would remain a defense in copyright infringement lawsuits.¹²⁰ Both Justice Scalia and Justice Alito were skeptical of the Petitioner, questioning the premise that laches should not be available, as it is based on equity rather than a statute, while Justice Breyer doubted why anyone would innovate if they could face a lawsuit at anytime in the future.¹²¹ Commenting on the unique attributes of the Copyright statute, Justice Breyer argued:

. . . the uniqueness is that it's rolling. And as long as you have a movie that's going to make money over 30 years, and in year 33, they bring an action against something that didn't happen till year 30 . . . If you just leave it up to the legal part, they can bring whenever they want, as long as the movie is still making money . . . Who in their right mind would go ahead and make this year after year, if a huge amount of money is going to be paid to this copyright owner who delayed for 30 years and didn't even seem to own it? . . . But I'm saying, in practice, no one in his right mind could go and continue to produce this movie when every penny is going to have to go to the copyright owner --- not every penny that they spent, but

¹¹⁸ See *id.* (affirming the District Court's finding of expectations-based prejudice).

¹¹⁹ See *Petrella*, 134 S. Ct. at 1972 (granting the 9th Circuit Court of Appeal's petition for a writ of certiorari).

¹²⁰ See Brad R. Newberg, *'Raging Bull' Decision Breathes New Life Into Late-Breaking Copyright Suits*, FORBES (2014), archived at <http://perma.cc/C6KM-XC4J> (commenting that the tone of the oral arguments at the outset was in favor of accepting laches to a degree).

¹²¹ See Transcript of Oral Argument at 4-9, 20, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (No. 12-1315) (providing insight into Justice's Breyer's thought process); see also Newberg, *supra* note 120 (reporting on the view of the Justices during early proceedings).

every penny of profit. And --- who's going to do it?
Because, every three years they face a lawsuit.¹²²

In a six-three vote, the Supreme Court held that laches was unavailable as a defense when a suit fell within the statute of limitations.¹²³ The majority noted that the Supreme Court has always been wary about laches and the Court often cautioned against using it as a defense.¹²⁴ Justice Ginsburg, writing for the majority, cited to three prior Supreme Court cases which favored a legislatively creative limitation over an equitable remedy¹²⁵: *Holmberg v. Armbrrecht*¹²⁶, *Merck & Co. v. Reynolds*¹²⁷, and *County of Oneida v. Oneida Indian Nation of N.Y.*¹²⁸ While these three cases are outside copyright, they support the notion of laches applying only in the absence of a set limitation period.¹²⁹ Furthermore, the majority found comfort in the separate-accrual rule providing limited retrospective relief in the event of

¹²² See Transcript of Oral Argument, *supra* note 121, at 20, 22 (quoting Justice Breyer).

¹²³ See *Petrella*, 134 S. Ct. at 1978 (concluding that in the absence of equitable estoppel or extraordinary circumstances, laches is unavailable as a defense to copyright infringement claims if a statute of limitations was in existence and the claim fell within that time period); see also Newberg, *supra* note 120 (noting majority's holding that laches cannot prevent a lawsuit if seeking damages brought within the Copyright Act's three year limitation period).

¹²⁴ See *Petrella*, 134 S. Ct. at 1973 (commenting on the Supreme Court's history of discouraging equitable remedies replacing statutory-based law).

¹²⁵ See *id.* (noting the case law Justice Ginsburg cited in the majority opinion).

¹²⁶ See *Holmberg v. Armbrrecht*, 327 U.S. 392, 393 (1946) (reviewing the application of laches in the matter of equity involving the concealment of shares). The court failed to formally adopt a position although stated that while customarily, a statute of limitations does not apply to matters of equity, when Congress statutorily creates a time limitation, that prevails. *Id.* at 395-98.

¹²⁷ See *Merck & Co. v. Reynolds*, 559 U.S. 633, 652 (2010) (affirming "[l]aches within the term of the statute of limitations is no defense at law" (quoting *United States v. Mack*, 295 U.S. 480, 489 (1935))). *But see Petrella*, 134 S. Ct. at 1984-85 (Breyer, J., dissenting) (highlighting that *Mack* was decided prior to the unification of equity and law in the Federal Rules of Civil Procedure).

¹²⁸ See *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 244 n.16 (1985) (suggesting applying laches to a legal action would be novel, while failing to take a formal position on the matter); see also *Petrella*, 134 S. Ct. at 1973 (canvassing Supreme Court precedent in supporting the premise that courts were wary of allowing laches).

¹²⁹ See *Petrella*, 134 S. Ct. at 1973 (examining the origin and modern application of laches).

infringement.¹³⁰ The majority noted that this rule alongside the three-year statute of limitation already accounts for delay, therefore allowing a defendant to maintain income outside of the three-year period.¹³¹ Lastly, in the event infringement is found, the defendant may “prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.”¹³²

Despite the appearance of a bright-line rule, two “exceptions” lay within this decision.¹³³ First, similar to the Sixth Circuit, the Supreme Court recognized situations where extraordinary circumstances may warrant a similar action as laches.¹³⁴ Although the defense may not be raised to bar suit completely, the majority suggests that situations may “be of sufficient magnitude to warrant, at the very outset of litigation, curtailment of the relief equitably awardable.”¹³⁵ In dicta, the Court insinuates that in circumstances that would result in “total destruction of the work” or affect “innocent third parties” in devastating ways, a judge could use his or her discretion in limiting relief.¹³⁶ Second, the majority left open the possibility of equitable estoppel barring a lawsuit if a plaintiff intentionally

¹³⁰ See *id.* (explaining the separate accrual limitation on relief).

¹³¹ See *id.* (observing the interplay between the separate-accrual rule and the § 507(b) statute of limitations).

¹³² See 17 U.S.C. § 504(b); *Petrella*, 134 S. Ct. at 1973 (pointing to the defendant’s ability to allow for deductible expenses and other income not related to the plaintiff’s copyrighted work).

¹³³ See *Petrella*, 134 S. Ct. at 1977 (noting the two possible applications of a laches-like remedy).

¹³⁴ See *id.* (recognizing the need to be flexible in the presence of certain circumstances).

¹³⁵ See *id.* (elaborating on exceptions to the holding where in extraordinary circumstances, relief may be limited due to unreasonable delay).

¹³⁶ See *id.* (providing examples of extreme cases analogous to the type of situations that may be considered for limiting relief); see also *Chirco*, 474 F.3d at 236 (holding laches available to bar a copyright infringement suit claiming infringement of architectural plans). *Chirco* involved the alleged copying of architectural plans for a condominium building. The plaintiff, aware of the infringement, waited until 168 units were built, a majority of which were occupied, before filing suit. The defendants filed for summary judgment on the basis of laches, arguing that the plaintiff’s delay was prejudicial to the defendants and to innocent third parties. *Id.* at 230. The holding was affirmed on appeal. *Id.* at 236. See *New Era*, 873 F.2d at 584-85 (affirming the district court’s rejection of an injunction). In *New Era*, the author of a biography allegedly infringed on the plaintiff’s copyright; however, did not act on the alleged infringement until the biography was published, shipped and distributed. Although the district court focused on fair use as a defense, the appellate court noted that injunctive relief remained improper due to laches. *Id.*

made a misrepresentation as to why suit was delayed and the defendant relied on that misrepresentation.¹³⁷ The majority noted two major differences between equitable estoppel and laches: delay isn't essential to the defense and throughout history, equitable estoppel has been recognized as a defense not only in the court of equity but also in the court of law.¹³⁸

B. The aftermath of *Petrella*: Copyright infringement suit filed against Led Zeppelin

Twelve days after the *Petrella* decision, Michael Skidmore, acting as Trustee for the Randy Craig Wolfe Trust, filed suit against Led Zeppelin for copyright infringement.¹³⁹ Randy Craig Wolfe (a.k.a. Randy California) was the founding member of the rock band Spirit, a band with a jazz-rock fusion sound that used “mind-bending and mood altering effects.”¹⁴⁰ In 1968, Spirit released an album entitled *Spirit*, featuring an instrumental song “Taurus.”¹⁴¹ In the same year, the band Led Zeppelin began touring in the United States and often opened for Spirit.¹⁴² Forty-three years later, the estate of

¹³⁷ See *Petrella*, 134 S. Ct. at 1977 (suggesting equitable estoppel may bar suit in cases of intentional misrepresentations for delaying a law suit).

¹³⁸ See *id.* (describing the major differences between equitable estoppel and laches). But see *Petrella*, 134 S. Ct. at 1979-80 (Breyer, J., dissenting) (arguing equitable estoppel will not remedy the prejudice that defendants experience from unreasonable delay).

¹³⁹ See Plaintiff's Amended Complaint at ¶¶ 165-191, *Skidmore v. Zeppelin*, No. 2:14-CV-03089, (E.D. Pa. May 31, 2014) (stating the claims and requested relief against the defendants). It is commonplace for Trustees, estates, or family members inheriting a copyright to bring suit after acquiring the copyright. See, e.g., *Corwin v. Walt Disney Co.*, 475 F.3d 1239 (11th Cir. 2007) (involving a suit brought by an estate for alleged infringement of an artist's painting); *Smith v. Casey*, 741 F.3d 1236 (11th Cir. 2014) (providing an example of an estate bringing a music infringement claim); Kory Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar 'Blurred Lines' Lawsuit*, ROLLING STONES (2015), archived at <http://perma.cc/MVB7-6B9M> (indicating the copyright to “Got to Give It Up” was owned by the Marvin Gaye estate).

¹⁴⁰ See Plaintiff's Amended Complaint, *supra* note 139, ¶ 1, ¶ 17 (introducing the formation and style of the band Spirit). Spirit was innovative by using various effects in their music such as using Etherwave-Theremin, delay and distortion in their recordings and live performances. *Id.*

¹⁴¹ See Plaintiff's Amended Complaint, *supra* note 139, ¶ 18 (stating the date in which the album *Spirit* was released).

¹⁴² See Plaintiff's Amended Complaint, *supra* note 139, ¶¶ 35-37 (establishing the year the rock band Led Zeppelin began performing with Spirit). According to the

‘Randy California’ claims Led Zeppelin infringed on its copyright of its song “Taurus” in the composition of the introduction of “Stairway to Heaven.”¹⁴³ In addition to monetary damages, Skidmore is also seeking an injunction of Led Zeppelin’s upcoming rerelease of *Led Zeppelin IV*, the album that originally included “Stairway to Heaven.”¹⁴⁴

IV. ANALYSIS

A. Laches and copyright: the pros and cons of *Petrella v. Metro-Goldwyn-Mayer, Inc.*

Until *Petrella*, courts have been free to use their discretion in applying laches as a defense in matters of equity.¹⁴⁵ Justice Ginsburg made a compelling argument against laches in copyright litigation cases, which focused largely on the congressional right in establishing a statute of limitations.¹⁴⁶ Justice Ginsburg reasoned that the imposition of a judicial remedy that originated out of the old court of equity might cause conflict with the legislative branch, something the

complaint, Jimmy Page expressly stated in a 1972 interview that Spirit’s performances “struck him on an emotional level. See Plaintiff’s Amended Complaint, *supra* note 139, ¶ 40. See Scott Bombay, *The Supreme Court connection to the Led Zeppelin lawsuit*, CONSTITUTION DAILY (2014), archived at <http://perma.cc/9PZX-9UK3> (explaining professional relationship between Led Zeppelin and Spirit). During this time period, Jimmy Page, Led Zeppelin’s guitarist, was introduced to Spirit’s song “Taurus”; opening for Spirit six times. *Id.*

¹⁴³ See Plaintiff’s Amended Complaint, *supra* note 139, ¶¶ 35-38 (claiming Led Zeppelin’s access to *Taurus* is evidence of copyright infringement). In addition to direct copyright infringement, Skidmore is also claiming contributory copyright infringement, a form of infringement where a “plaintiff must show that the defendants induced, caused, materially contributed to, and participated in the infringement of Plaintiff copyrighted song, . . .”. *Id.* ¶ 177. Skidmore is also claiming vicarious copyright infringement, in which a defendant “must vicariously profit from the direct infringement while declining the exercise a right to stop or limit the direct infringement.” *Id.* ¶ 181.

¹⁴⁴ See Plaintiff’s Amended Complaint, *supra* note 139, at Claims for Relief (listing the claims for relief); see also Bombay, *supra* note 142 (stating “Stairway to Heaven” was released in the band’s album entitled *Led Zeppelin IV*).

¹⁴⁵ See Locke, *supra* note 51, at 142 (suggesting courts within the circuits interpret the elements of laches differently); see also Sheerin, *supra* note 17, at 854 (inferring the court’s discretion in applying as evidenced by a circuit split); Swartz, *supra* note 69, at 1463 (observing the different application of laches amongst the circuits).

¹⁴⁶ See *supra* Part III.A (summarizing the majority’s opinion).

court strives to avoid.¹⁴⁷ Justice Breyer, however, made an equally convincing argument in favor of laches, focusing on the issue of unreasonableness and unfair prejudice that affects the defendant.¹⁴⁸

First, the Court found little support for laches in copyright claims due to the fact that Congress was silent on the matter.¹⁴⁹ Although other equitable remedies are still permitted and actively employed, laches is in direct conflict with § 507(b), enacted by Congress.¹⁵⁰ The majority noted that equitable estoppel might be available as an affirmative defense in a copyright infringement action if the elements are met.¹⁵¹ ‘Estoppel’ originated from the court of law, a significant difference from laches, however, *equitable* estoppel, like laches, grew from the court of equity and similarly distorts

¹⁴⁷ See *Petrella*, 134 S. Ct. at 1974 (asserting copyright is no different than causes of action in the presence of a statute of limitations); see also Locke, *supra* note 51, at 140 (highlighting the separation of powers laid out by the U.S. Constitution). According to constitutional law, it is out of the province of the courts to trespass into the territory of the legislative or executive branches. Due to presence of equitable remedies within the judicial system, such as laches and injunctions, the treatment of those actions remained ambiguous. See Locke, *supra* note 51, at 140. See *supra* Part III.A (reiterating Justice Ginsburg’s reasoning).

¹⁴⁸ See *Petrella*, 134 S. Ct. at 1979-80 (Breyer, J., dissenting) (asserting that a bright line rule is not appropriate as there are circumstances, specifically in the framework of copyright, where laches is warranted). Justice Breyer distinguished the circumstances in *Petrella* from the situation where suit is delayed in order to facilitate settlement rather than lengthy litigation. As demonstrated by this example, delay often occurs after the defendant, the author of a derivative work, expended great efforts and money in the creation and marketing of that work. By waiting, the Plaintiff would hope to receive higher percentage of profits in settlement or a more favorable licensing agreement, than if the plaintiff sued at the moment he or she learned of infringement. *Id.*

¹⁴⁹ See *id.* at 1982 (distinguishing the majority’s point of view on interpreting silence within the Copyright Act).

¹⁵⁰ See 17 U.S.C. § 507(b) (defining the statutory duration for copyright civil claims); *Petrella*, 134 S. Ct. at 1978 (confirming the claim against MGM fell within the three-year statute of limitations); see also S. REP. NO. 85-1014, *supra* note 55, at 1962 (expressing the need for a federal statute of limitations for civil copyright claims). In the formation of a copyright statute of limitations, Congress weighed the opinions of those affected in determining the appropriate length of time. For example, movie producers and music publishers lobbied for a shorter period while the copyright owner naturally desired a longer statutory duration. See S. REP. NO. 85-1014, *supra* note 55, at 1962. Congress compromised on a three-year duration that addressed the needs of both sides while discouraging forum shopping. See Sheerin, *supra* note 17, at 861-62.

¹⁵¹ See *Petrella*, 134 S. Ct. at 1977 (suggesting equitable estoppel as an acceptable defense in a copyright infringement action).

the statute of limitations.¹⁵² It would stand to reason that if other equitable doctrines affecting the statute of limitations may be asserted, such as equitable estoppel, laches should be available as well.¹⁵³

The majority also embraced the equitable doctrine of tolling in copyright claims, a tool available to the plaintiff to extend the statute of limitations under certain circumstances.¹⁵⁴ Justice Breyer rightfully questioned the majority's acceptance of tolling while rejecting laches, where tolling is inevitably pro-plaintiff and laches pro-defendant.¹⁵⁵ Similar to Congress being silent on laches in respect to the statute of limitations, Congress did not specify whether tolling was permitted in copyright infringement actions.¹⁵⁶ While the judicial branch should not override Congress, history has demonstrated the court can act when Congress is silent on a matter.¹⁵⁷ Justice Breyer noted that while Congress created a three-year statute of limitations for copyright infringement suits, they did not outright ban equitable defenses such as laches.¹⁵⁸ Furthermore, Congress unified

¹⁵² See Anenson, *supra* note 78, at 381 (illustrating that while the original doctrine came from the court of law, the equitable nature that continues into modern litigation derived from the court of equity).

¹⁵³ See BOURDEAU, *supra* note 77 (pointing to the relationship between laches and equitable estoppel).

¹⁵⁴ See *Petrella*, 134 S. Ct. at 1975 (suggesting tolling exists when a statute of limitations is in place as opposed to laches, which traditionally was applied in the absence of a statute of limitations).

¹⁵⁵ See *id.* at 1983 (Breyer, J., dissenting) (questioning the majority's acceptance of equitable tolling, favoring the plaintiff, while rejecting the inverse of that doctrine that favors the defendant).

¹⁵⁶ See *id.* (interpreting Congress' silence as acceptance of equitable doctrines existing concurrently alongside Congressionally imposed limitations).

¹⁵⁷ See *Petrella*, 134 S. Ct. at 1982 (Breyer, J., dissenting) (asserting that there is no merit in arguing Congress' silence on laches in the copyright statute was an absolute rejection of the defense). For example, Congress was silent on the issue of tolling, an equitable remedy for plaintiffs that lengthens a period of time by pausing or delaying the statute of limitations. Tolling by its very definition is involved in circumstances where a statute of limitations is active. Yet, this concurrent existence between equity and law has not sparked a split between the circuits. Therefore, one could assume that if Congress was silent in the matter of tolling co-existing with a statute of limitations, laches also may be accepted as a proper relief for defendants. *Id.* See *Separation of Powers*, *supra* note 91 (suggesting that there is no clear separation of powers and due to the complexities of a democracy, responsibilities occasionally overlap causing tension).

¹⁵⁸ See *Petrella*, 134 S. Ct. at 1981 (commenting on the idiosyncrasies between tolling and laches as allowable equitable rules in the modern court of law).

the courts of equity in law without removing equitable remedies from “civil actions.”¹⁵⁹

Second, in addition to the idea that the court cannot override a statutory limitation, the Court turned to the separate-accrual rule, striking an appropriate balance by allowing a copyright owner to sue for an infringing act yet limiting the look back period to three years.¹⁶⁰ This rule, as opposed to the continuing wrong doctrine, allows a copyright plaintiff to file suit for each single act of infringement, triggering the statute of limitations.¹⁶¹ While the dissent made a respectable point regarding the potential for successive lawsuits against the same defendants as long as infringement persists, it is more likely that a defendant will stop infringing if found liable or issue preclusion would prevent further litigation.¹⁶² The existence of the separate-accrual rule, however, does not account for the unfair prejudice a defendant experiences when there is an unreasonable delay in bringing suit.¹⁶³ Therefore, while this argument has merit when contesting the start of the statute of limitations, it does not remedy the harm that comes from unreasonable delay and unfair preju-

¹⁵⁹ See FED. R. CIV. P. 8 (including estoppel, laches, and statute of limitations as defenses to federal civil actions).

¹⁶⁰ See *Petrella*, 134 S. Ct. at 1969-70 (explaining the three year look back period and its interplay with the separate accrual rule); see also Sheerin, *supra* note 17, at 893 (differentiating the separate accrual rule from a continuing wrong doctrine). In cases that involve a series of infringements, the latter approach only requires the last infringement occur within the three-year statutory period, whereas the separate accrual rule states that the statute of limitations runs separately for each discrete infringement, rather than treating a series of infringements as one. See Sheerin, *supra* note 17, at 862, 893.

¹⁶¹ See ABRAMS, *supra* note 84 (defining the separate-accrual rule as applied to copyright infringement claims); see also Sheerin, *supra* note 17, at 893 (reiterating the application of the separate-accrual rule).

¹⁶² See *Petrella*, 134 S. Ct. at 1980, 1981 (arguing an effect and consequence of the separate accrual rule as applied to copyright claims).

¹⁶³ See Brief for Respondents, *supra* note 50, at 16-18 (providing an example of the prejudice a defendant suffers). For example, delay in bringing suit may result in a loss of evidence. In regards to the copyright dispute in *Petrella*, the Brief for Respondents pointed to the parties' inability to compare the original and allegedly infringing works. Additionally, the test for copyright infringement is a fact-specific analysis; in the event that evidence has been lost or difficult to retrieve, the analysis becomes ineffective. This is especially true in cases where defendants assert independent creation; unequivocal evidence of lack of access is a complete defense to copyright infringement. *Id.* at 17.

dice.¹⁶⁴ Laches, alternatively, does not attempt to change when the statute of limitations begins to run; it is a defense to bar adjudication of a claim due to unfair prejudice to the defendant due to the unreasonable delay in bringing suit.¹⁶⁵

Because the Ninth Circuit was the most favorable to laches, it is not surprising that both the District Court and the Court of Appeals found in favor of the equitable defense.¹⁶⁶ Despite their history, the Supreme Court was not persuaded by the Ninth's Circuit's liberal outlook on copyright defenses.¹⁶⁷ While the Second Circuit is no stranger to copyright disputes, the majority failed to consider cases from the Ninth Circuit, home to a vast percentage of art, music, entertainment, and sports.¹⁶⁸ As noted in oral arguments, "90 plus percent of all copyright cases ... are filed in the Second Circuit or the Ninth Circuit."¹⁶⁹ Although the Ninth Circuit does not necessarily hold more weight than any other circuit, a more comprehensive balance between circuits might have been beneficial to determining the best course for all aspects of copyright.¹⁷⁰ Copyright disputes within the movie and music industries, common in California, often involved cases with unreasonably long delays invoking prejudicial affects as

¹⁶⁴ See Brief for Respondents, *supra* note 50, at 16-18 (reiterating the consequences of unreasonable delay in filing suit).

¹⁶⁵ See Brief for Respondents, *supra* note 50, at 26 (arguing laches and the statute of limitations can coexist). "[W]hile laches and statutes of limitations are certainly related, they are not a substitute for one another. Each serves its own purpose and requires its own showing." *Id.* at 8.

¹⁶⁶ See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 957 (2012) (holding laches barred plaintiff's copyright claim).

¹⁶⁷ See *Danjaq, LLC*, 263 F.3d at 954 (finding laches appropriate in fact specific circumstances involving re-releases along with an unreasonable delay and prejudice to the defendant).

¹⁶⁸ See *Petrella*, 134 S. Ct. at 1972 (illustrating a lack of Ninth Circuit cases in the majority reasoning in their rejection of laches); see also *New Era*, 873 F.2d at 585 (illustrating a strong example of copyright law examining laches within the Second Circuit).

¹⁶⁹ See Transcript of Oral Argument, *supra* note 121, at 47 (quoting Attorney Perry, on behalf of the respondents, articulating which circuits the vast majority of copyright claims are filed in the Ninth and Second Circuits). The Ninth Circuit includes California, home to Hollywood and Los Angeles, the hub of the entertainment industry while New York, also heavily involved in media and entertainment, is part of the Second Circuit. See *Court Locator*, *supra* note 88 (illustrating the map of the United States circuit courts).

¹⁷⁰ See Sheerin, *supra* note 17, at 878 (noting the effect of Hollywood within the Ninth Circuit).

the defendants continue to produce, perform and market their work.¹⁷¹ These arguments suggest that not only should different forms of intellectual property be treated differently, but perhaps also within the variants of copyright.¹⁷²

B. Distinguishing subject matter in copyright

Despite the enumerated list of subject matter in the Copyright Act, protection covers any work as long as it is original, fixed, and in a tangible medium of expression.¹⁷³ This variety extends from software, architecture, sculpture, literary text, and music, thus it is necessary to treat some subject matter different from others.¹⁷⁴ Due to this broad spectrum, Congress recognized the need to distinguish subject matter within copyright in several respects.¹⁷⁵ For example, the sixth exclusive right, to publically perform by means of digital audio transmission, only pertains to sound recordings, and under specific conditions, artists of limited edition art are afforded moral rights under the Visual Arts Rights Act.¹⁷⁶ Furthermore, the Copyright Act provides which exclusive rights attach to each form of subject matter and which exceptions were designed to pertain specifically to various situations and subject matters.¹⁷⁷

¹⁷¹ See *Danjaq, LLC*, 263 F.3d at 954 (analogizing the facts of the screen play to re-releases of a music album and to the release of the screen play in *Petrella*).

¹⁷² See *Petrella*, 134 S. Ct. at 1974, 1979 (arguing for and against the defense of laches in copyright).

¹⁷³ See 17 U.S.C. § 102(a)(b) (providing the statutory requirements to be considered a work protectable by copyright law).

¹⁷⁴ See 17 U.S.C. § 102(a)(1)-(8) (listing the types of work that fall under copyright).

¹⁷⁵ See 17 U.S.C. § 106 (distinguishing rights of musical works from sound recordings).

¹⁷⁶ See 17 U.S.C. § 106A (providing moral rights exclusive to works of visual art only under specific requirements). Such requirements include being a painting, sculpture, drawing, or print in limited edition of 200 copies or less, signed by the artist and consecutively numbered or a still photographic image for exhibition purposes only, signed by the photographer or in limited edition of 200 copies or less signed and consecutively numbered. *Id.* See 17 U.S.C. § 101 (defining “work of visual art”).

¹⁷⁷ See 17 U.S.C. § 106 (listing the six exclusive rights and the subject matter covered by each); 17 U.S.C. §§ 107-122 (exposing the variations in copyright law, such as exemptions and limitations for particular subject matter in specific situations along with specific scope of rights for certain subject matter).

Music has always played a special role in copyright, often creating a conundrum in determining infringement.¹⁷⁸ One major difficulty is extracting the protectable elements from those that remain in the public domain.¹⁷⁹ Imagine an author of a fictional literary work learned of a new literary work that he or she believes infringes upon his or her novel about a dystopian society.¹⁸⁰ The only familiarity between the two novels is the existence of a dystopian society and one character challenging authority in an effort for change.¹⁸¹ It is easy to identify this as a general theme or plot, unprotected by copyright; in fact, many novels exemplify this “idea”: *Lord of the Flies*,¹⁸² *The Giver*,¹⁸³ *The Hunger Games*,¹⁸⁴ and *Divergent*¹⁸⁵ to name a few.¹⁸⁶ However, infringement may occur if the author goes beyond

¹⁷⁸ See Brent, *supra* note 7, at 229 (reiterating the difficulties in recognizing music’s unique attributes when adjudicating infringement lawsuits).

¹⁷⁹ See Keyes, *supra* note 13, at 430 (outlining the major difficulties of adjudicating copyright infringement claims). The author refers to the adjudicating standard as the “reasonable listener.” *Id.* at 431. This standard is similar to the “ordinary lay observer.” *Id.*

¹⁸⁰ See *supra* note 40 and accompanying text (pointing to examples of novels involving a dystopian society).

¹⁸¹ See *supra* note 40 and accompanying text (highlighting the common elements between the provided examples).

¹⁸² See GOLDING, *supra* note 40 (illustrating the story of a boy and his classmates that became stranded on a deserted island, having to fend for themselves and creating a new society that ultimately became dysfunctional and controlling).

¹⁸³ See LOWRY, *supra* note 40 (revealing the story of a young boy about to find his place within a utopian society and how he challenges the society’s way of life after receiving his adult job as “The Giver”).

¹⁸⁴ See COLLINS, *supra* note 40 (narrating the story of a broken society and their “solution” for peace by requiring two “tributes” to participate in the Hunger Games, a fight to the death with one survivor). Katniss Everdeen ends up challenging the rules of the game and the dictatorship structure of Panem. *Id.*

¹⁸⁵ See ROTH, *supra* note 40 (portraying a futuristic world where society is divided into factions to keep peace and order). At the age of sixteen, the children partake in a ceremony where they choose their faction, allowing them to either stay with their family’s faction or create a new future. Beatrice (“Tris”) Prior leaves her family’s faction joining Dauntless, the police force of the society, where she learns of and challenges one faction’s attempt to control all. *Id.*

¹⁸⁶ See *supra* note 45 and accompanying text (applying the various means of distinguishing the idea from the expression). This hypothetical does not suggest copyright infringement of literary works is always easy to litigate. It is merely used as a method to distinguish how people perceive copying visually versus audibly. See *supra* note 45 and accompanying text.

what is permissible and copies the expression of those ideas.¹⁸⁷ Expression is exemplified in not only the use of the characters, the names of the towns, the skills or occupations of the characters, but also within the story telling itself.¹⁸⁸ There is a distinct ability to visually identify an idea and discern that idea from the expression of a work in literary form because the “ordinary lay observer” can perceive the language and more easily extract the unprotected elements before applying the substantial similarity test.¹⁸⁹ Similarly, motion pictures and works of visual art are perceived visually, thus people are able to use language to describe and separate the elements within the public domain from expression.¹⁹⁰

Alternatively, music is perceived aurally and is, in a sense, its own language.¹⁹¹ While a jury determines if there is substantial similarity, they must do so only with respect to the expression.¹⁹² What is near impossible for the ordinary person to accomplish, however, is to separate the “idea” from the “expression” when aurally perceiving music.¹⁹³ Experts and attorneys can educate jurors that notes and chord progressions cannot be copyrighted but aurally separating this distinction is not only difficult for experts to realize, it is also near impossible for the ordinary person to accomplish.¹⁹⁴

The advancement of technology in the past ten years has enabled more access to music than in years past.¹⁹⁵ Unlike patent law, where independent creation may bar a patent, copying in fact, the first step to proving copyright infringement, requires “copying,” and

¹⁸⁷ See *supra* note 40 and accompanying text (pointing to the distinction between an idea and expressions of those ideas).

¹⁸⁸ See *supra* notes 182-185 and accompanying text (illustrating examples of novels with a similar general theme that differ in the storytelling of the plot).

¹⁸⁹ See *supra* note 45 and accompanying text (exposing examples of applying the substantial similarity test to a variety of subject mediums).

¹⁹⁰ See *supra* note 45 and accompanying text (referring to examples of illustrations and film that required the application of the substantial similarity test to determine copyright infringement).

¹⁹¹ See Francis, *supra* note 16, at 500 (suggesting music is the least “tangible” medium of expression and therefore difficult to recognize infringement).

¹⁹² See *supra* note 40 and accompanying text (reiterating that only the expression may be provided copyright protection).

¹⁹³ See Francis, *supra* note 16, at 500 (reiterating the difficulty in separating of the idea from the expression in music).

¹⁹⁴ See Francis, *supra* note 16, at 500 (advocating that music is incapable of conveying ideas, thus impossible to separate from the expression).

¹⁹⁵ See *supra* notes 5-6, 27-28 (outlining the evolution of music within society).

therefore access, to the plaintiff's work.¹⁹⁶ Nonetheless, with the development of Spotify, iTunes, SiriusXM, Pandora, YouTube, and countless others, music travels faster than ever, and often, new songs can go viral within minutes.¹⁹⁷ While access is still a major part in proving copying in fact, a prerequisite to finding substantial similarity, musicians today most likely have unlimited access to music unless one is completely isolated.¹⁹⁸

In many copyright cases, it is easy to identify a single act of infringement on the copyright owner's rights, such as a single copy or single distribution.¹⁹⁹ One such example was cited in *Petrella: Chirco v. Crosswinds Community*, involving a copyright dispute over a single act of reproducing architectural plans.²⁰⁰ Under § 507(b), the plaintiff may sue within three years of the infringement.²⁰¹ Additionally, if other rights are allegedly infringed, the copyright owner has the right to sue for those alleged infringements.²⁰² Subject matter that is subjected to a series of infringements, however, may end up creating an unreasonable perpetual statute of limitations, especially if the alleged violator is infringing upon multiple exclusive rights.²⁰³ Un-

¹⁹⁶ See *supra* note 44 and accompanying text (explaining the element of access to prove "copying in fact" before entering the substantial similarity analysis); see also 35 U.S.C. § 102 (2015) (requiring "novelty" as a condition on patentability). This means that regardless of independent creation, if the invention or improvement is not novel and prior art exists, the invention will be denied a patent. *Id.*

¹⁹⁷ See *supra* note 6 and accompanying text (providing examples of music streaming applications via internet).

¹⁹⁸ See *supra* note 6 and accompanying text (inferring the internet and streaming services have permitted music to permeate the world).

¹⁹⁹ See *Chirco*, 474 F.3d at 229 (involving a case with a discrete moment of infringement upon the owner's copyright on architectural plans).

²⁰⁰ See *id.* (pointing to the alleged copying of architectural plans for a "twelve-plex" condominium, which included the sole right for construction).

²⁰¹ See 17 U.S.C. § 507(b) (providing that a claim brought within the three-year statute of limitations); see also *Petrella*, 134 S. Ct. 1968 (pointing to the three-year look back period in awarding damages for copyright infringement). This is distinguished from the three year "look back" period when calculating remedies. This look back period limits monetary relief to the past three years of infringement from when the suit was filed. *Id.*

²⁰² See 17 U.S.C. § 501 (defining infringement within the copyright context as a violation of any of the exclusive rights set forth in §§ 106-122).

²⁰³ See *Petrella*, 134 S. Ct. at 1979-80 (Breyer, J., dissenting) (describing how an indefinite statute of limitations could be created in the presence of the separate accrual rule with a series of infringements); see also Sheerin, *supra* note 17, at 893 (inferring that despite the fact that infringements may occur continuously, the separate accrual rule will attach a new running statute of limitations for each individual

like architectural plans, musical works and sound recordings are both subject to a series of infringements, potentially over decades.²⁰⁴ This not only affects the alleged direct infringer, but it also affects those who might be contributorily and vicariously liable.²⁰⁵

C. No Laches for Zeppelin

Despite the human inclination to understand one's motive in enforcing their rights, it is not relevant when filing a copyright infringement claim.²⁰⁶ It is their right, as a copyright owner, to determine whether or not to take action; often copyright owners may feel filing suit is unnecessary unless it interferes with a market they intend to capitalize on within their long-term plans.²⁰⁷ Although moral rights aren't recognized in American copyright law, copyright owners are often compelled to file suit to protect their work when they feel reputational harm.²⁰⁸ Consequently, a copyright owner may abstain

infringement). In consequence, while today's world involves rapidly changing technology, movies and most predominantly music are purchased and re-released throughout the years. *See* Sheerin, *supra* note 17, at 893.

²⁰⁴ *See* 17 U.S.C. § 106 (distinguishing rights between sound recordings and musical works); *see also* Keyes, *supra* note 13, at 418-19 (highlighting the growth of music copyright cases since the emergence of the rock 'n roll era in the 1950's). It is not coincidental that copyright infringement suits against music blossomed in the 1950's, the same time when music became commercially available in the means of a sound recording. *See* Keyes, *supra* note 13, at 418-19.

²⁰⁵ *See* SILBEY, *supra* note 14, at 21 (identifying secondary liability, both contributory and vicarious, originating out of common law). Common law secondary liability allows a copyright owner to assert a claim against third parties who may be contributorily or vicariously liable if they either facilitate the infringement or materially contribute with knowledge of the infringement. *Id.* For example, the Trustee for the Randy Craig Wolfe Trust not only has a claim for direct infringement, but both contributory and vicarious liability against all nine defendants. *See* Plaintiff's Amended Complaint, *supra* note 139, ¶¶ 187-91 (stating the claims for contributory and vicarious infringement).

²⁰⁶ *See* SILBEY, *supra* note 14, at 75 (inferring motive is not a requirement for filing suit in a society where copyright owners have a choice regarding if, when, and to whom they decide to enforce their copyright).

²⁰⁷ *See* SILBEY, *supra* note 14, at 75-76 (stressing the values of copyright owners and their potential motives in filing suit against an alleged infringer).

²⁰⁸ *See* 17 U.S.C. § 106A (providing weak moral rights protection for works of visual art); *see also* SILBEY, *supra* note 14, at 76, 150-51 (concluding that a lawsuit may not provide a remedy to reputational harm). Owners find relief, however, by being able to protect their work as if it was a child. *See* SILBEY, *supra* note 14, at 156.

from suit but change his or her mind down the road, in the event an infringement occurred within three-years of filing suit.²⁰⁹

Due to the unfortunate untimely death of Randy Craig Wolfe, the lead singer of the band Spirit, one will never know if he ever desired to file suit against Led Zeppelin for infringement of the opening bars to *Stairway to Heaven*.²¹⁰ Between *Stairway to Heaven*'s compositional birth and the lawsuit at issue, Led Zeppelin spent money, time, and effort in marketing their album and hit song.²¹¹ By 1997, after 'Randy California' passed away, there had already been a long delay, and arguably unreasonable and undue prejudice to the defendants.²¹² Only twelve days after the *Petrella* decision, the Randy Craig Wolfe Trust filed suit against Led Zeppelin.²¹³ This coincidental time frame could suggest that the Trustee believed their claim was barred by laches.²¹⁴

D. Proposal that copyright law should be flexible in treating various subject matters differently.

The United States was founded on a system consisting of three branches of government working neatly together as laid out by the U.S Constitution as system of "checks and balances", alongside a growing culture that incentivizes and promotes creativity and free speech.²¹⁵ Naturally, the judicial system is careful not to overstep its boundaries and allow judicial decisions to override congressional legislation.²¹⁶ It is understandable that courts are wary to allow a de-

²⁰⁹ See SILBEY, *supra* note 14, at 75 (inferring that suit can be brought regardless of reason as long as it is within the statutory time frame).

²¹⁰ See Plaintiff's Amended Complaint, *supra* note 139, ¶¶ 172-202 (deducing from the lack of reasoning stated in the complaint).

²¹¹ See Chace, *supra* note 8 (exposing the cost of writing and producing a hit song).

²¹² See Hertzfeld, *supra* note 12 (commenting on the forty-three year delay in filing suit against alleged copying of a song with substantial revenue earnings, reflective of the effort and money that was put into the song).

²¹³ See Bombay, *supra* note 142 (observing the forty-three year delay in filing suit coinciding with the *Petrella* decision).

²¹⁴ See Bombay, *supra* note 142 (suggesting the suit against Led Zeppelin was originally believed to be barred by laches).

²¹⁵ See *Separation of Powers*, *supra* note 91 (describing division of powers and the roles each branch plays within the government).

²¹⁶ See Locke, *supra* note 51, at 141 ("[i]f 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"); see also Swartz, *supra* note 69, at

defendant to assert an equitable defense to a claim brought within the statute of limitations.²¹⁷ As indicated, one purpose of § 507(b) is to provide a defendant with peace of mind.²¹⁸

Delay undoubtedly was taken into account when Congress enacted a three-year limitation period.²¹⁹ Despite this short duration, it is possible that due to the nature of a particular means of expression, infringements could continue to occur throughout the life of the work, thus creating a perpetual statute of limitations.²²⁰ Though this limitation is monetary and may only limit damages, it fails to ease one's mind in all circumstances.²²¹

Additionally, the duration for copyright is extraordinarily long.²²² Throughout the life of the copyright statute, the duration for copyright has increased exponentially; today copyright owners receive exclusive rights in their copyright for the life of the author plus seventy years.²²³ In recent years, plaintiffs filing music copyright

1465 (exploring one example within the Fourth Circuit recognizing a conflict of powers if they were to allow laches as a defense to suit).

²¹⁷ See Swartz, *supra* note 69, at 1465 (pointing to the court's uncomfortable position in overruling Congress).

²¹⁸ See 17 U.S.C. § 507(b) (stating the statutory limitation to bring a civil copyright suit is three years); see also Locke, *supra* note 51, at 138 (enumerating purposes of a statutory limitation period for initiating suit).

²¹⁹ See *Petrella*, 134 S. Ct. at 1973 (pointing to how the statute takes the separate accrual rule and the three year look back period into account); see also S. REP. NO. 85-1014, *supra* note 55, at 1961 (discussing state statute of limitations in the consideration of a federal limitation period).

²²⁰ See *Danjaq, LLC*, 263 F.3d at 953 (illustrating infringing acts for a re-release of DVDs and those in the underlying movie should be treated the same when invoking laches); see also *Petrella*, 134 S. Ct. at 1980 (Breyer, J., dissenting) (noting the danger in allowing a rolling statute of limitations due to a sequential infringement); Sheerin, *supra* note 17, at 865 (discussing the focus on future "continuing acts of infringement" as opposed to treating re-releases as discrete acts).

²²¹ See Locke, *supra* note 51, at 153 (noting Congress chose that a three year statutory period gives all peace of mind).

²²² See 17 U.S.C. § 302 (pointing to the duration statutory section in the Copyright Act).

²²³ See *id.* (imposing a duration of life of the author plus seventy years for individual copyright holders and the last surviving joint author or in the event the work is anonymous, pseudonymous or a work made for hire, the duration lasts ninety-five years from its first publication or 120 years from creation, whichever expires earlier); 17 U.S.C. § 303 (establishing a length of duration for "[w]orks created but not published or copyrighted before January 1, 1978"). Due to the formalities that originated with the Copyright Act prior to 1976, the Copyright Laws strived to provide some protection to works created but not published prior to the effective date

claims are commonly the executor of the estate, heirs, or beneficiaries of a will or trust, that inherited the copyright rather than the author within his or her lifetime.²²⁴ While it is the right of the estate to bring an action against an alleged infringer (if they hold the copyright), it raises the question of whether allowing a copyright to exceed past the life of the author lives up to the primary purpose of copyright law as stated in the Constitution.²²⁵ The opposite appears to occur; rather than promoting creativity, estates are exercising their right as a copyright holder merely to make money.²²⁶ This in conjunction with an indefinite statute of limitations eliminating any peace of mind a defendant may have decades after composing.²²⁷

The three year look-back period poses yet another problem in regards to sequential infringements for a musical work and sound recording.²²⁸ In *Petrella*, Justice Ginsburg suggested that the Copyright Act allows a defendant to “offset against profits made in that [three year period] ‘deductible expenses’ incurred in generating those profits.”²²⁹ On the surface, this may appear as a sound argument until one tries to calculate revenue from the actual infringement material within the music.²³⁰ For example, the Randy Craig Wolfe Trust claims that Led Zeppelin stole the introduction of *Stairway to Heaven* from Spirit’s song *Taurus*.²³¹ This creates quite a challenge when only a portion of a work is allegedly copied and where there are multi-

of the Copyright Act of 1976. See 17 U.S.C. § 303; see also Schley, *supra* note 39, at 120 (highlighting the current copyright duration for authors and work for hire).

²²⁴ See *Petrella*, 134 S. Ct. at 1971 (noting daughter of original copyright owner inherited her father’s copyright in the screen play); Plaintiff’s Amended Complaint, *supra* note 139, ¶ 60-62 (pointing to the plaintiff as the trustee for the Randy Craig Wolfe Trust); *supra* note 139 and accompanying text (providing additional examples of copyright claims brought by estates and trustees).

²²⁵ See U.S. CONST. art. I, § 8, cl. 8 (establishing the Constitutional power to provide copyright protection).

²²⁶ See *supra* note 224 and accompanying text (providing examples of cases where suit is brought by an estate, trust or family member who inherited the copyright).

²²⁷ See Locke, *supra* note 51, at 138 (stating the statute of limitations is to provide peace of mind); see also Sheerin, *supra* note 17, at 893 (exploring the role of the separate-accrual rule in continuous acts of copyright infringement).

²²⁸ See Sheerin, *supra* note 17, at 864 (identifying the difficulty in applying laches in the presence of a rolling statute of limitations, also known as a look back period).

²²⁹ See *Petrella*, 134 S. Ct. at 1973 (referring to the Copyright Act, §504(b) Actual Damages and Profits).

²³⁰ See *id.* (discussing the availability to offset profits).

²³¹ See Plaintiff’s Amended Complaint, *supra* note 139, ¶ 181 (claiming the defendants are liable for direct copyright infringement).

ple avenues of income.²³² The first problem is distinguishing the percentage of profits of one download of *Stairway to Heaven*; the claim is not against the entire song, only the introduction.²³³ One would have to calculate exactly how much sixteen measures of music is worth, a very subjective value.²³⁴ Second, successful musicians often tour, gaining revenue from ticket sales and merchandise.²³⁵ Lastly, although less prominent with digital downloads, albums are sold, with a price attached to the album as a whole rather per song.²³⁶ Unless there is a method to calculate the difference in revenue between what was gained from the allegedly infringing material and other means of profit, this argument has little merit.²³⁷

Most musical work copyright infringement suits are claims for a violation of the first exclusive right, the right of reproduction.²³⁸ Except for “covers”, it is unlikely and difficult to realize a situation where a defendant is allegedly in violation of the second exclusive right, the right to prepare a derivative work.²³⁹ Thus, the suit against Led Zeppelin is distinguishable from *Petrella*, a case involving a derivative work of the plaintiff’s father’s screenplay.²⁴⁰ In dismissing laches as an available defense, Justice Ginsburg left open the possi-

²³² See *myMUSICroyalties*, *supra* note 8 (highlighting the available royalties accessible to musicians); see also *Research Reports*, *supra* note 8 (providing a statistical resource on the music industry).

²³³ See *LED ZEPPELIN*, *supra* note 1 (identifying the first recording of *Stairway to Heaven*).

²³⁴ See *The New Economics of the Music Industry*, *supra* note 8 (demonstrating the statistical difficulty in calculating percentage of profits).

²³⁵ See Sheffer, *supra* note 8 (inferring a significant percentage of income is made from touring).

²³⁶ See *CDs & Vinyl*, *supra* note 10 (providing an outlet to digitally purchase a music album).

²³⁷ See Chace, *supra* note 8 (observing the elements of pricing out the production and development of music); see also Knopper, *supra* note 8 (discussing the difficulty in calculating income especially in a digital age with internet radio and YouTube contributing to the revenue).

²³⁸ See 17 U.S.C. § 106(1) (pointing to the statutory text for the right to reproduction).

²³⁹ See *id.* at § 106(2) (1976) (providing the statutory text for the right to prepare derivative works).

²⁴⁰ Compare *Petrella*, 134 S. Ct. at 1970-71 (describing the alleged violation as an infringement of the plaintiff’s right to prepare derivative works), with Plaintiff’s Amended Complaint, *supra* note 139, at 23-26 (bringing a cause of action for direct copyright infringement).

bility of equitable estoppel.²⁴¹ However, the Court failed to realize the scope of this defense in copyright; equitable estoppel requires reliance on a statement or action by the plaintiff.²⁴² Therefore, this most likely only applies to derivative works and perhaps to the right to publically perform or display a copyrighted work.²⁴³ A defendant claiming independent creation of his musical work cannot rely on a plaintiff to his injury.²⁴⁴

The potentially infinite statute of limitations may negatively affect promoting “progress and science”.²⁴⁵ Musicians may be afraid to be influenced by others, and despite the fact that monetary damages only count for three years, they are not immune from the time and financial trouble of being sued.²⁴⁶ A defendant may find himself, many years later, subject to an unsatisfactory infringement analysis, allowing “ordinary lay observers” to distinguish between the ideas and expression within music; a task which is extraordinarily difficult to do aurally without musical training.²⁴⁷ Therefore, the judicial system and Congress should strike a balance.²⁴⁸ There should be room

²⁴¹ See *Petrella*, 134 S. Ct. at 1977 (inferring equitable estoppel may be allowed as a defense if the conditions are met as it does not undermine § 507(b)).

²⁴² See *Anenson*, *supra* note 78, at 389 (reiterating the requirements to assert equitable estoppel as a defense).

²⁴³ See 17 U.S.C. § 101 (defining “derivative work”). A derivative work is defined as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or other modifications which, as a whole, represent an original work of authorship

Id.

²⁴⁴ See *Estoppel*, BLACK’S LAW DICTIONARY (10th ed. 2014) (illustrating the “injury” requirement of equitable estoppel); see also *supra* note 44 and accompanying text (inferring lack of access may prove independent creation).

²⁴⁵ See U.S. CONST. art. 1, § 8, cl. 8 (providing the congressional power and goal for copyright law); see also *Sheerin*, *supra* note 17, at 892 (distinguishing discrete acts of infringements from a series of continuing infringements).

²⁴⁶ See *Locke*, *supra* note 51, at 138 (pointing to an opportunity for a party to bring suit providing infringement occurs within the three year statutory period).

²⁴⁷ See *supra* note 45 and accompanying text (reiterating the “ordinary lay observer” test in determining copyright infringement).

²⁴⁸ See *Keyes*, *supra* note 13, at 420-421 (echoing the rare qualities of music as opposed to other mediums protected by copyright law).

within the system for the rules to mold around the type of work being protected.²⁴⁹

V. CONCLUSION

Music permeates throughout this world. It's experienced in almost all facets of our daily lives. Yet, the law has yet to understand how to mold and adapt to its needs. Like other mediums in the entertainment industry, music is not just consumed but is created, reproduced, distributed, and performed. Special to the industry, however, is its tendency to be reproduced and performed over centuries. Musicians have reunion tours, come-back tours, and successful albums re-releases where the original works and the new works are sold to the masses. It is for this reason that music is prone to continuous infringements, creating a potential indefinite statute of limitations. Although the outcome of the Led Zeppelin suit is unknown at this time, policy suggests that the band, and related parties, should not have to stand on eggshells in fear that their innovations will be perpetually subject to a lawsuit.

It is not surprising that ambiguities remain in copyright law. Although Congress has attempted to provide specifications to cater to various subject mediums, much more has to be accomplished in regards to music. Though laches may no longer act as a viable defense to an infringement claim, there is hope that both the judicial system and Congress will realize the need for a better application of the law, not only for the variations of intellectual property, but also for the idiosyncrasies within copyright law itself. While the merits of the claim against Led Zeppelin have yet to be litigated, had laches been available, perhaps the Randy Craig Wolfe Trust would have abstained from filing suit.²⁵⁰

²⁴⁹ See SILBEY, *supra* note 14, at 284 (cautioning against strict protocols in intellectual property law); see also Keyes, *supra* note 13, at 443 (proposing copyright law needs to be reconsidered due to unique and changing music industry).

²⁵⁰ See Answer of Defendants James Patrick Page, et al. at ¶ 210, *Skidmore v. Zeppelin*, No. 2:15- CV-03462 (C.D. Cal. May 20, 2015) (asserting the affirmative defense of laches despite the holding of *Petrella*, after litigating jurisdiction for approximately a year); Answer of Defendants Warner/Chappell Music Inc., et al. ¶ 211, *Skidmore v. Zeppelin*, No. 2:15- CV-03462 RGK (C.D. Cal. May 20, 2015) (stating laches as one of the affirmative defenses in their newly filed Answer in United States District Court of the Central District of California).