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„Running out of Time: Examination of United States and European Union Copyright Statute of Limitations in The Digital Age.“

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TABLE OF ABBREVIATIONS

The abbreviations, as used in this paper, have the following meanings assigned to them:

i. ("*Auspcape*") means *Auscape International v. National Geographic Society*
ii. ("DMCA") means Digital Millennium Copyright Act
iii. ("EC") means European Economic Community
iv. ("ECD") means e-Commerce Directive ("ECD")
v. ("ECJ") means The European Court of Justice
vi. ("Enforcement Directive") means directive on the enforcement of intellectual property right
vii. ("EU") means European Union
viii. ("InfoSoc Directive") means directive on the harmonization of certain aspects of copyright and related rights in the information society
ix. ("IP") means intellectual property
x. ("Metro") means Metro-Goldwyn-Mayer
xi. ("MGM") means MGM Domestic Television Distribution LLC
xii. ("OSPs") means Online Service Providers
xiii. ("*OTK*") means Case C- 367/15 OTK, EU:C:2017:36
xiv. ("Petrella") means *Petrella v. Metro-Goldwyn-Mayer, Inc*.
xv. ("*Polar Bear*") means *Polar Bear Productions, Inc. v. Timex Corporations*
xvi. ("*Roley*") means *Roley v. New World Pictures, Ltd.*
xvii. ("*Sohm*") means *Sohm v. Scholastic Inc.*
xviii. ("Starz") means Starz Entertainment LLC
xix. ("*Starz*") means *Starz Entertainment, LLC v. MGM Domestic Television Distribution*
xx. ("*Taylor*") means *Taylor v. Meirick*
xxi. ("US") means United States
xxii. ("*Viacom*") means *Viacom International, Inc. v. YouTube, Inc.*
xxiii. ("WIPO") means World Intellectual Property Organization

CHAPTER I: INTRODUCTION

Since the late 1900's internet access has been available to the general public.[1] As of 2020, it was estimated that 4.5 billion people had access to the internet, and that number has only grown since.[2] This powerful tool has granted entrepreneurs, scientist, artists, and the like, access to the largest collective stores of data in human history. For example, just 60 seconds on the internet consists of more than 500 hours of content uploaded to YouTube, 695,000 stories shared on Instagram, 70 million messages sent via WhatsApp and Facebook Messenger, as well as a staggering 1.6 million U.S. dollars spent online.[3] These statistics are certainly a representation of the feat of human ingenuity.

Nevertheless, for authors and copyright holders, the growth of the internet has also presented new challenges—namely in policing their works in an ever-growing space of unauthorized exploitation and piracy which has amounted to countless losses. For example, in 2017 users of pirate sites made 73.9 billion visits to illegally access music and 106.9 billion visits to access pirated movies and TV shows.[4] Moreover, it is also estimated that between 2015 and 2017 the software industry lost roughly $46.3 billion to piracy.[5] Similarly, two studies from IMGembed and Copytrack show that of the nearly 3 billion images shared on the internet daily, only 15 percent are used with a valid license.[6]

Due to the volume of data that is being uploaded to the internet on a continuous basis, one of the major issues for copyright holders is detecting infringements when they occur.[7] Consequently, understanding when a claim for copyright infringement has become time barred

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[1] Robert Kahn, Michael A. Dennis, *Internet: computer Networks*, Britanica, Jun. 26, 2023, https://britannica.com/technology/Internet/Advertising-and-e-commerce (last accessed Jun. 27, 2023).
[2] *Id.*
[3] Claire Jenik*, Digitalization: A Minute on the Internet in 2021*, Jul. 30, 2021, https://www.statista.com/chart/25443/estimated-amount-of-data-created-on-the-internet-in-one-minute/ (last accessed Jun. 27, 2023).
[4] Damjan Jugovic Spajic, *Piracy Is Back: Piracy Statistics for 2023*, DataProt, May 5, 2023, https://dataprot.net/statistics/piracy-statistics/#:~:text=More%20than%2080%25%20of%20global%20online%20piracy%20can,in%20the%20United%20States%20due%20to%20music%20piracy. (last accessed Jun. 27, 2023) (Digital video piracy is costing the US economy between $29.2 and $71 billion each year as well as between $40 and $97billion in annual movie industry).
[5] *Id.*
[6] Copytrack GmbH, *Global Infringement Report 2019: International Image Theft in Comparison*, Copytrack, page 2, 2019 ("it is estimated that more than 2.5 billion images are stolen daily. These license violations have the potential to result in up to €532.5 billion in damages daily).
[7] Chandra Gehri Spencer, *Beware of the Highwayman on the Information Superhighway: A Balanced Proposal to Protect Copyrights Within the National Information Infrastructure*, 24 Pepp. L. Rev. 121, 131, 1996.

as per the respective limitations period is of particular note for rightsholders and lawyers alike.[8] Under United States ("US") law, the limitations period for civil actions spans 3 years from the time the "claim has accrued."[9] There are two recognized common law doctrines which explain the instances under which a claim can accrue:

> "[T]he the *discovery rule* and the *injury rule*. Under *the discovery rule*, a claim accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights. These kinds of claims can only accrue one time. Conversely, under the injury rule, a copyright plaintiff's claim accrues when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it."[10]

Of particular merit for inquiry is the interpretation of the discovery rule as it is applied to rightsholders interests within the context of the digital age. Today, courts in the US are currently at odds with respect to their interpretation of the application of the discovery rule, regarding the extent to which damages are recoverable by a plaintiff.[11] Under the decision in *Sohm v. Scholastic Inc.* ("*Sohm*"), the Second Circuit has held that a plaintiff may only recover damages commensurate with the three years prior to filing suit.[12] Conversely, The Ninth Circuit, in *Starz Entertaitment, LLC v. MGM Domestic Television Distribution* ("*Starz*"), has held that a plaintiff is eligible to recover damages for the entire period of the defendant's infringement.[13]

The aim of this paper, among other things, seeks to argue in favor of *Starz* and to establish how *Sohm*'s interpretation of the discovery rule is untenable, and ultimately detrimental to the pecuniary interests of rightsholders and can neither be justified based on the historical developments of copyright in the United States nor based on the current legal landscape of the internet. Furthermore, in light of the uncertainty surrounding the discovery rule today, I argue that forum shopping and an increased reliance on statutory damages will become the norm within

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[8] *See e.g.*, *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (1980) (The supreme court of Minnesota held defendant attorney liable for legal malpractice for failing to inform the plaintiff of the two year statute of limitations for her medical malpractice claim against).

[9] *See* 17. U.S.C. §507(b).

[10] *See Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1330 (11th Cir. 2023) (internal citations omitted) (emphasis added).

[11] *See* Candace Sundine, *SOHM STARZ WILL NEVER ALIGN: HOW THE SPLIT BETWEEN THE 2ND AND 9TH CIRCUITS WILL IMPACT DAMAGES IN COPYRIGHT CASES* , 43 Loy. L.A. Ent. L. Rev. 37, 2022 ("Federal courts have attempted to create a uniform administration of federal statutes, but circuit splits inevitably occurred. However, the stark split between the Second and the Ninth Circuits has created damages models that are diametrically opposed.").

[12] *See Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020).

[13] *See Starz Ent., LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022).

the United States Federal Court system until the Supreme court firmly rules on the issue or legislative action is taken by Congress to resolve the dispute.

Additionally, an analysis of copyright statute of limitations is of particular value within the European Union ("EU"), as it concerns an area of EU copyright law that remains unharmonized, as evidenced by varying limitation periods provided for by national laws of the Member States of the European Union.[14] As such, this paper seeks to compare the relative limitations periods provided for in French and German copyright law and compare them to their US counterpart. In doing so, the aim is to examine any differences between national copyright laws. Moreover, to the extent possible, a comparison of EU copyright limitations period may be useful in informing United States legislation that has yet to address the issue, with respect to the discovery rule, as well as provide a basis for future efforts to harmonize EU copyright law for a more complete integration of the internal market.[15]

The following substantive sections will address; (II) the history and development of copyright law within the United States, Europe, and the international sphere; (III) the scope of copyright protection; (IV) conceptual underpinnings of statute of limitations; (V) copyright statute of limitations under United States and EU law; (VI) remedies under copyright law; (VII) liability limitation for Online Platforms; and (VIII) potential actions rightsholders can pursue to protect their interests. Lastly, I will (IX) analyze the findings and (X) state my conclusions therefrom.

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[14] C. civ. Book III, Title XX, Chapter II, Section 1, Item 2224 (Modified by LAW n°2008-561 of June 17, 2008 - art. 1); Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 25 of the Act of 23 June 2021 (Federal Law Gazette I, p. 1858), §102 Limitation Period.

[15] *See* Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Recital 4 ("A harmonized legal framework on copyright and related rights, through legal certainty…will foster substantial investment in creativity and innovation, including network infrastructure, an lead in turn to growth and increased competitiveness of European industry").

CHAPTER II: HISTORICAL BACKGROUND

The following Chapter will explore the history of copyright from its beginnings to its development in the United States, Europe, as well as internationally.

A. Inception of Intellectual Property as Property to be owned

There is considerable consensus among legal scholars that the inception of copyright law is strongly associated with the invention of the printing press.[16,17] However, the norms and practices of the time preceded the legal framework that we understand as copyright law today.[18] In contrast to contemporary copyright and intellectual property laws generally, archaic systems consisted of privileges and exceptions to the law rather than a recognition of an author's inherent rights.[19] Generally speaking, these privileges were awarded to offer protection from competition and secure returns on an investment rather than a recognition of the intellectual effort exerted to create a work or the development of culture and the arts.[20] An example of particular note in the genealogy of copyright that stretches back to fifteenth century Venice—the home of what some historians consider to be the first printing privileges—was the privilege granted to Johannes Speyer.[21] This *ad hoc* grant given to Speyer was, however, hardly distinguishable from other industrial privileges granted by the Venetian government.[22] In a somewhat unlikely turn of events, the expansion of artisan crafts and the guild system provided an environment in which

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[16] Ronan Deazley, Martin Kretschmer, Lionel Bently, et al, *Privilege and Property: Essays on the History of Copyright*, Cambridge: OpenBook Publishers, 2010.

[17] History.com editors, *Printing Press*, Oct. 10, 2019, https://www.history.com/topics/inventions/printing-press (last accessed Jun. 27, 2023) ("The printing press is a device that allows for the mass production of uniform printed matter, mainly text in the form of books, pamphlets and newspapers. Created in China, the printing press revolutionized society there before being further developed in Europe in the 15th Century by Johannes Gutenberg and his invention of the Gutenberg press").

[18] *Privilege and Property*, *supra* note 16 at 6.

[19] *Id*. at 22 ("Such *privilegia* took various forms, from exclusive monopolies permitting the inventors or introducers of a new technology the right to exploit their trade or engage in other productive activity, to printing privileges bestowing the publishers or authors with the exclusive rights to print and sell a work").

[20] *Id.* ("[T]he subject matter of copyright protection initially developed, focusing first on the material realm of printing technology before it expanded to less material objects of protection").

[21] Id. at 23 ("The earliest and most famous patent was a five-year monopoly granted on 18 September 1469 to a German print master Johannes of Speyer to establish a press and foster printing withing the Venetian Republic"); *see also* Horatio Fortini Brown, *The Venetian Printing Press 1469-1800: An Historical Study Based upon Documents for theMost Part Hitherto Unpublished*, London: John C. Nimmo, pp.6-7, 1891.

[22] *Privilege and Property*, *supra* note 16 at 25-31 ("Any distinctive sense of their product as a particular category of commodity – as a work of mind – appears to have been absent from these documents, as the authors hoped to…claim a familiar trade privilege protection – a protection based upon the principle of protecting economic interests in material goods.").

specialized knowledge was seen as constituting intangible property which could be protected and owned.[23,24]

Additionally, the Renaissances' elevation of certain arts such as painting, sculpture, and architecture to the status of "fine arts" saw the rise of many such as Leonardo da Vinci and Brunelleschi who embodied the ideals of the time, which placed an emphasis on knowledge, learning, and individual genius.[25] In one particular case brought before the Venetian Senate, Marc'Antonio Raimondi, who had been copying artist Albrecht Dürer's woodcuts from the *Life of the Virgin* series, was prevented from using his name and monogram.[26] Interestingly, although the copying of the work was justified under Renaissance theories of learning through imitation, the "reproduction of the artist's personal sign which suggested the artist's personal presence in the making of a particular work of art" was seen as a "unique object created by a seemingly irreplaceable individual."[27] Thus, Venice and the Renaissance played an instrumental role in planting the seeds of copyright and the idea that intangible assets could be owned as property. Moreover, there appears to be a sense that authors of works held, at least in some respects, particular rights over their works.[28]

B. Development of Modern Copyright Law

i. United States

The first printing press arrived in Cambridge, Massachusetts, the then British colony, at the end of 1638 by the motivations of Reverend Jose Glover, a puritan minister, and the son of a wealthy merchant family, who was connected with the colony's ruling elite, and likely linked with the founding of Harvard College.[29] Although, Glover did not survive the voyage to the colonies, Harvard and the colonies elite played an active role in managing the press as a resource

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[23] *Id*. at 31-34.
[24] *See* Pamela O. Long, *Invention, Authorship, 'Intellectual Property' and the Origin of Patents: Notes toward a Conceptual History*, Technology and Culture, 32, 4, p.870, 1991 ("[I]n promoting attitudes of ownership toward intangible property—craft knowledge and processes as distinct from material products—the guilds developed the concept of 'intellectual property' without ever calling it that").
[25] *Privilege and Property*, *supra* note 16 at 43.
[26] *Lisa Pon, Raphael, Dürer, and Marcantonio Raimondi: Copying and the Italian Renaissance Print*, New Haven: Yale University Press, 2004.
[27] *Privilege and Property*, *supra* note 16 at 43-44 ("[W]hile the Venetian legal system did not consider the copying of Dürer's prints to be illegal, at the same time, it offered protection for something much more subtle and immaterial—not the image but its expression and the artist's individual style").
[28] *Id.*
[29] *Id*. at 91 ("the Puritan leaders of Massachusetts Bay with their intellectual background must have perceived the potential of the press to their scholarly endeavors, to the civil authority of their government and their religious mission").

in service of the colony.[30] As printing spread throughout the colonies in the late 1600's its use was heavily restricted and required governmental permission to be operated.[31]

In 1672, the bookseller, John Usher propositioned the Massachusetts authorities to allow him to undertake, at his own expense, printing of the laws of the colony.[32] John Usher's grant, is heralded by some as the first American copyright[33], although in reality it resembled the printing privileges common to Europe, and read:

> "Mr John Vsher hauing binn at the sole chardge of the impression of the the booke of lawes [...] the Court judgeth it meete to order, that for at least seven yeares, vunless he shall haue sold them all before that tjme, there shallbe no other or further impression made by any person thereof in this jurisdiction."[34]

Like many of the older European printing patents, colonial printing grants were for publisher's economic privilege and had no regard whatsoever for authorship.[35] After the Revolution, however, there appears to be an ideological shift in copyright in favor of authorship.[36] In 1781 the Connecticut awarded Andrew Law, a musician, "free & full Liberty & license[…] for the sole printing, publishing & vending the several Tunes & Anthems above-mentioned […] for the term of five years."[37] Law's Connecticut Privilege marked a shift towards recognition of authors rights and early legal recognition of the same.[38]

In the following years in 1783, the Connecticut legislature established the first general copyright act[39]—which was influenced by the 1710 English Statute of Anne[40]—and later

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[30] *Id*. at 92.
[31] *Id*. at 93-94 ("Colonial governmental approach to the press oscillated between viewing it as a dangerous instrument of religious heresy and political unrest, sometimes resulting in a complete ban, and the acknowledgment of such dangers accompanied by an appreciation of the value of the press in promoting governmental purposes or the public good").
[32] *Id.* at 96.
[33] *Id.*
[34] *Id.* 96-99.
[35] *Id*. at100.
[36] *Id*. at 103.
[37] C.J. Hoadly, *Andrew Law's Privilege (1781)*, The Public Records of the State of Connecticut, Vol. 9, Hartford: various publishers, pp.537-8, 1894-1953.
[38] *Privilege and Property*, *supra* note 16 at 100.
[39] An Act for the Encouragement of Literature and Genius, 1783 Conn. Acts 133.
[40] Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) ("[T]he Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years,... and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen Years, to Commence from the Day of the First Publishing the same, and no longer").

adopted by most other states at the time.[41] Then, in 1789 the United States Constitution was passed which enabled congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries,"[42] A congressional report construes the constitutional intent of the clause as follows:

> "not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given, Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors."[43]

Thus, the "the authors' property interest ('their copy rights') and the public interest in advancement of knowledge" were seen as two separate considerations."[44] These considerations were duly implemented in the passing of the Copyright Act of 1790.[45] Within the next 100 years the Copyright Act was amended several times and the scope of copyright protection expanded from books, maps, and charts to encompass dramatical works (1856); photographs (1865); visual arts (1870); right to public performance of dramatic works (1856) and musical composition (1897).[46]

The early to mid-1900's also saw an expansion of copyright with the passing of the Copyright Act of 1909,[47] which too was amended several times to encompass motion pictures (1912), nondramatic literary works (1953), and sound recordings fixed and first published after 1972.[48] The latter half of the 1900's saw the Copyright Act of 1976,[49] the most current Copyright Act, signed into law by President Gerald Ford, and the passing of the Digital Millennium Copyright Act ("DMCA"), which provided for the implementations of several

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[41] *Privilege and Property*, *supra* note 16 at 110.
[42] U.S. Const. art. I, §8, cl. 8.
[43] H.R. Rep. No. 2222; *see also* A. Latman, R. Gorman & J. Ginsburg, *Copyright for the nineties*, 14, 3d ed. 1989.
[44] Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991, 999 (1990).
[45] Copyright.gov, *The 18th Century, Highlight: Congress Passes First Copyright Act*, https://www.copyright.gov/timeline/timeline_18th_century.html (last accessed Jun. 28, 2023) ("1790, the first copyright law is enacted under the new United States Constitution. Modeled off Britain's Statute of Anne, the new law is relatively limited in scope, protecting books, maps, and charts for only fourteen years with a renewal period of another fourteen years").
[46] *Id.*
[47] Pub. L. 60–349.
[48] Copyright.gov, *1900-1950, Highlight: Congress Passes First Comprehensive Copyright Law of the Twentieth Century*, https://www.copyright.gov/timeline/timeline_1900-1950.html (last accessed Jun. 28, 2023).
[49] Pub. L. 94–553.

World Intellectual Property Organization ("WIPO") treaties and provisions governing online infringements.[50]

Ultimately, the common thread that joins the various acts and amendments of copyright in the United States is a scheme that incentivizes creation through the recognition of author's rights to exploit their works for a limited time for the betterment of society—underscoring utilitarian principles.[51,52]

ii. Europe

The following section consists of the historical developments in copyright from the inception of the concept of *droit d'auteur*, which underlies the European understanding of copyright; followed by a discussion of copyrights development within the European Economic Communities to the present state of the European Union.

a. 18th to 19th century

Within Europe, the concept of *droit d'auteur* (right of the author), which stands for the proposition that copyright is an "essentially unrestricted natural right reflecting the 'sacred' bond between the author and his personal creation,"[53] did not begin to take shape in France, and continental Europe more broadly, until the first half of the 18th Century.[54] The earliest "copyrights" in France too found their form in printing privileges, much like the Venetian model, in order to protect the economic rights of publishers.[55] In fact, the early legal regime showed a rather stark indifference towards authors and relegated them to a position subordinate to publishers and booksellers.[56] The idea at the time encompassed a rather strict social contract that ensured remuneration to authors solely in exchange for publication of their works.[57]

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[50] Copyright.gov, *1950-2000, Highlight: Congress Passes Current Copyright Act*, https://www.copyright.gov/timeline/timeline_1950-2000.html (last accessed Jun. 28, 2023).

[51] *Privilege and Property*, *supra* note 16 at 4.

[52] B. Zorina Khan, *Intellectual Property and Economic Development: Lessons from American and European History*, Commission on Intellectual Property rights (2002) ("United States [intellectual property rights] system is based on an instrumentalist approach: that is, it adopts a pragmatic market orientation, with statutory rights that are designed to facilitate trade, innovation and social welfare").

[53] Jon M. Garon, Normative Copyright: *A Conceptual Framework for Copyright Philosophy and Ethics*, Cornell L. Rev. Vol. 88, 5, 1278, 2003.

[54] *Privilege and Property*, *supra* note 16 at 128.

[55] *Id*. at 117-19. ("[T]hese early privileges were royal favours often granted to reward someone for a public utility, as opposed to giving recognition to any natural or subjective right").

[56] Id. at 121-23 ("When an author obtained a privilege, he was forced to sell it to the bookseller and could not exercise those exclusive rights himself").

[57] *Id.*

However, in 1725 the French monarchy commanded the revocation of all abusive privileges by the booksellers,[58] and in a rather interesting turn of events, the booksellers argued, in response, their privileges were derived from "a theory of natural and perpetual property rights acquired from the authors as owners of the work in question."[59] Additional support came from philosophy; for example, under John Locke's proposition that man is proprietor of his person and labor, [60] it could duly be conceived that an author should be considered the owner "of the fruit of his intellectual labour."[61] Moreover, for French philosopher, Diderot, the possession man had over his intellectual endeavors appears to be a natural right:

> "Indeed, what can a man possess, if a product of the mind, the unique fruit of his education, his study, his efforts, his time, his research, his observation; if the finest hours, the finest moments of his life; if his own thoughts, the feelings of his heart, the most precious part of himself, that part which does not perish, that which immortalises him, cannot be said to belong to him? What comparison can there be between a man, the very substance of a man, his soul, and a field, a meadow, a tree or a vine which, at the beginning of time, nature offered equally to all men, and which the individual claimed for himself only by cultivation, the first legitimate means of possession? Who has more right than the author to use his goods by giving or selling them?"[62]

Moreover, this recognition of authors rights had spread to other parts of Europe; for example, in Germany "authors' rights were progressively regarded more as rights of intellectual property (*geistliches Eigentum*).[63] Similarly, the philosopher, Kant "regarded authors' rights not as

[58] Manus. Fçs. 22062, n. 41 (Arrêt du Conseil d'Etat portant règlement sur le fait de la librairie et imprimerie, 10 April 1725, Bibliothèque nationale de France).

[59] *Privilege and Property*, *supra* note 16 at 127-28 ("[I]t is ironic that the conceit of the author as owner of his intellectual work was an invention of the Parisian booksellers, one designed to assist them in defending their privileges against interference from both provincial competition and the State – a conceptual Trojan horse employed to secure their existing monopoly of the market").

[60] *See* John Locke, *Two Treatises of Government: In The Former the False Principles and Foundation of Sir Robert Filmer and His Followers, are Detected and Overthrown. The Latter is An Essay Concerning the True Original Extent and End of Civil Government*. London: Awnsham and John Churchill, 1698.

[61] *Privilege and Property*, *supra* note 16 at 129; *see also* Gehard Luf*, Philosophische Strömungen in der Aufklärung und ihr Einfluß auf das Urheberrecht, in: Robert Dittrich (Hrsg.), Woher kommt das Urheberrecht und wohin geht es. Wurzeln, geschichtlicher Ursprung, geistesgeschichtlicher Hintergrund und Zukunft des Urheberrechts*, Manz/Wien, S. 9 – 19, 1988.

[62] Letter on the Book Trade, Paris (1763), Bibliothèque nationale de France, Manus. Fçs (Naf) 24232, n. 3; see Diderot's Letter on the Book Trade (1763).

[63] *Privilege and Property*, *supra* note 16 at 183 ("Der Mensch hat […] ein aus seinem 'Urrecht' entspringendes 'ursprüngliche(s) Recht auf die Erzeugnisse seiner Geistes- und Körperkräfte'").

property rights, but as personal rights."[64] By the 19th century, it was a common opinion that authors' rights appeared "directly, automatically and exclusively with the creation of a work."[65]

b. Post Rome Convention to Present

The European Economic Community ("EC"), the precursor to the European Union, was established with the Treaty of Rome 1957.[66] It had been argued by some that, at the time, copyright law and EC primary law were two distinct bodies of law that did not interfere with one another because the EC was instituted to create a common marketplace and copyright law did not have a strong economic component—being seen mainly as a cultural product.[67] Moreover, many were convinced that any "problematic issues that may arise from the differences between national legislation in case of transnational exploitation of copyright protected works had in any event already been addressed at [an] international level by the Berne Convention," and Art. 7 of the Treaty applied the Berne Conventions principles of national treatment by reference.[68] However, it became clear that copyrights' territorial scope, that is the extent to which rights are afforded by a sovereign within its territory to enforce them,[69] was likely to conflict with the free movement of goods and services.[70]

By 1987, thirty years following the adoption of the Treaty of Rome, "the political, legal and technological landscape had considerably changed,"[71] along with increased cross-border exploitation of copyrighted works that could no longer be ignored.[72] The solution to the crisis effecting the free movement of intellectual property ("IP") within the internal market was to begin a process of harmonization, that started with Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs—considering them to be "literary and artistic works" as it

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[64] *Id.*
[65] *Id*. at 186
[66] Treaty establishing the European Economic Community ("Treaty of Rome") (1957).
[67] Agnès Lucas-Schloetter, *IS THERE A CONCEPT OF EUROPEAN COPYRIGHT LAW? HISTORY, EVOLUTION, POLICIES AND POLITICS AND THE ACQUIS COMMUNAUTAIRE*, pp. 6-7, 2021 ("In most of the Member States, related rights protecting investment had not yet been recognized and copyright was seen as being clearly distinct from 'industrial and commercial property', which Article 36 EC Treaty referred to").
[68] *Id.*
[69] Petr Szczepanik *et al*, *Digital Peripheries: The Online Circulation of Audiovisual Content from the Small Market Perspective*, Springer Series in Media Industries ed. 2020.
[70] Agnès Lucas-Schloetter, *supra* note 67 at 7.
[71] *Id*. at 8 ("The development of traditional broadcasting and the invention of new technologies such as cable and satellite had led to increased cross-boarder exploitation of copyright protected work").
[72] *Id*. ("The extended scope of copyright and the introduction of related rights protecting investment had also raised the economic significance of this IP right, which could no longer be considered as affecting only cultural matters and being in the sole competence of the Member States").

was understood under the Berne Convention.[73] The decision to extend copyright protection to computer programs can be seen as a political decision ensuring the competitive growth of the European software industry, that at the same time weakened copyrights' previously recognized cultural importance.[74] This marked a new era for IP and copyright in Europe.

Today, EU copyright law consists of 13 Directives and 2 Regulations which have been passed, harmonizing the rights of authors, performers, producers and broadcasters.[75] Arguably, the most important of which include the directive on the harmonization of certain aspects of copyright and related rights in the information society ("infoSoc Directive"),[76] and the directive on the enforcement of intellectual property right ("Enforcement Directive").[77] Nevertheless, harmonization has still been seen as a patchwork, mainly due to the "latitude traditionally left for the national legislature when implementing a directive," which allows for discretion among Member States when transposing directives to account for "the legal and cultural traditions" therein,[78] and to a lesser extent because of non-compliance by Member States when implementing directives.[79] On the other hand, The European Court of Justice ("ECJ") has filled gaps in the interpretation of many directives and explicated the extent of copyright protection in a number of cases including: the distribution right in *Cassina*;[80] originality in *Infopaq*;[81] equitable compensation in *Padawan*;[82] and the exhaustion principle in *UsedSoft*.[83] Although the role of the ECJ in its creation of legal doctrine has sometimes been criticized, its case law "now

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[73] *See* Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Recital 4 ("Whereas certain differences in the legal protection of computer programs offered by the laws of the Member Statues have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well come greater as Member States introduce New Legislation on this subject").

[74] Agnès Lucas-Schloetter, *supra* note 67 at 8.

[75] European Commission, *The EU copyright Legislation*, https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation, last updated Feb. 7, 2023 (last accessed Jul. 3, 2023).

[76] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[77] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[78] Agnès Lucas-Schloetter, *supra* note 67 at 9.

[79] Molly Killeen, *EU Commission Sends six states to court for not transposing copyright rules*, https://www.euractiv.com/section/copyright/news/eu-commission-sends-six-states-to-court-for-not-transposing-copyright-rules/, Feb. 15, 2023 (last accessed Jul. 3, 2023) ("Approaching one year from this latest initiative, Bulgaria, Denmark, Finland, Latvia, Poland, and Portugal have been referred to the EU Court for failing to notify the Commission of their transposition of the Copyright Directive").

[80] Case C-456/06 *Peek & Cloppenburg KG v Cassina SpA* [2008] EU:C:2008:232.

[81] Case C-5/08 *Infopaq international A/S v Danske Dagblades Forening* [2009] ECR I-6569.

[82] Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de Espaňa* [2010] ECR I-10055.

[83] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* [2012] EU:C:2012:407.

has an influence not only on the *exercise*, but also on the *existence* of copyright, a field that lies traditionally within the sole competence of the Member States."[84]

iii. International Copyright

Copyright, is not granted per se, rather it first requires recognition by law.[85] The call for international recognition of foreign copyrights came in the latter half of the 19th century under a perceived need "to protect authored works from international PIRACY, or unauthorized copying."[86] For example, it was "alleged that American publishers indiscriminately reprinted books by foreign authors without even the pretense of acknowledgement."[87] This is mainly because American copyright, at the time, did not recognize foreign works and, thus, American publishers and producers freely pirated foreign literature, art, and drama.[88] This stood starkly in contrast to "countries such as France, where Louis Napoleon's Decree of 1852 prohibited counterfeiting of both foreign and domestic works."[89] Because of the disunity in recognition of foreign copyrights, many countries retaliated by electing not to recognize the copyrights of foreign works, like in the United States.[90]

The Berne Convention for the Protection of Literary and Artistic works would mark the first steps to international recognition of copyright.[91] The agreement was adopted on September 9, 1886 in Berne, Switzerland and has since been revised during several international conferences: Paris (1896); Berlin (1908); Berne (1914); Rome (1928); Brussels (1948); Stockholm (1967); and Paris (1971).[92] The agreement contains a series of provisions determining the minimum protection to be granted to copyrighted works, and most importantly, is founded on three basic principle that contracting states are obliged to follow.[93] First, works originating in one contracting state must be given the same degree of protection that are accorded to works by its own nationals (principle of national treatment).[94] Second, Protection must not be conditioned on

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[84] Agnès Lucas-Schloetter, *supra* note 67 at 10 (emphasis in original).
[85] Dr. Parmod Malik, Monika, *Historical Development of Copyright, International Journal of Law Management & Humanities*, Vol. 5 Iss. 1, 561, 2002.
[86] *Id.* at 565.
[87] Khan, *supra* note 52 at 40.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Berne Convention for the Protection of Literary and Artistic Works, 1886.
[92] Malik, *supra* note 85 at 565.
[93] *Id.*
[94] Berne Convention for the Protection of Literary and Artistic Works, 1886.

compliance with any formalities such as registration or deposits of copies.[95] This is mainly because as the categories of protected works began to expand, it became less viable to properly fit these new categories squarely within the old regime of formalities.[96] Particularly for works such as "sculptures, painting, drawings and photographs, registration and deposit proved very difficult."[97] Third, Protection is independent of the existence of protection in the country of origin of the work.[98]

Almost a century after the Berne Convention, the WIPO was established in 1970, as the convention establishing the World Intellectual Property Organization came into force.[99] As society entered the digital age, reformation to international copyright protection became "more important because of the new economy, technology development, and its impact on the creation and use of literary and artistic works."[100] The WIPO Copyright Treat (1996), a special agreement under the Berne Convention, deals with 2 subject matters important for authors in the digital age, namely, "computer programs" and "compilations of data or other materials."[101] Additionally, copyright and other IP have benefited internationally from the TRIPS Agreement, which is, "to date the most comprehensive multilateral agreement on intellectual property."[102]

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[95] Berne Convention, *supra* note 91; *see also Privilege and Property*, *supra* note 16 at 188 ("In the nineteenth century, copyright formalities were thought valuable for a variety of reasons…At the time it seems that formalities, and registration in particular, were seen as a panacea that could cure nearly all problems, at least those concerning title and assurances of property").
[96] *Privilege and Property*, *supra* note 16 at 196-98 ("[A]bstract work identities are not easily captured in formalities, especially if they are not fixed in some tangible medium. It is hard to imagine the registration of a performed musical work or the deposit of an oral lecture, speech or sermon (not to think of marking these works with a notice of some kind). Hence, there was some tension between the abstraction and existing formalities").
[97] *Id.* at 198.
[98] Berne Convention, *supra* note 91.
[99] WIPO, *WIPO—A Brief History*, https://www.wipo.int/about-wipo/en/history.html (last accessed Jul. 8, 2023) ("WIPO is a member state-led, intergovernmental organization, with its headquarters in Geneva, Switzerland").
[100]Malik, *supra* note 85 at 567; *see also* WIPO Copyright Treaty, Preamble.
[101] Art. 4, WIPO Copyright Treaty.
[102] Malik, *supra* note 85 at 566; *see also* Agreement on Trade-Related Aspects of Intellectual Property Rights.

CHAPTER III: SCOPE OF COPYRIGHT PROTECTION

The following Chapter will provide a brief overview of the relevant legal provisions that govern the scope of copyright protection within the United States and the European Union, respectively.

A. United States Copyright Law

In the United States, copyright protection subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated."[103] However, copyright protection does not extend to ideas, processes, procedures, systems, methods of operation, concepts, principles, or discoveries.[104] Copyright holders enjoy exclusive rights under 17 U.S.C. §106 "to do an to authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[105]

These rights are, nevertheless, subject to the limitations set forth in 17 U.S.C. §§107-122, and span for the life of the author plus 70 years.[106]

B. European Copyright law

Within the European union copyright law protection extends to "literary and artistic works" defined under Art. 2 of the Berne convention, and includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[107]

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[103] 17 U.S.C. §102(a) (Works of authorship include: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) audiovisual works; (7) sound recordings; and (8) architectural works).
[104] 17 U.S.C. §102(b); *see also Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1196 (2021) ("Copyrights protect 'expression' but not the 'ideas' that lie behind it.").
[105] 17.U.S.C. §106.
[106] 17 U.S.C. §§107-122; 17 U.S.C. §302(a).
[107] Berne Convention, *supra* note 91.

Consequently, the work must be a result of human intellectual intervention.[108] Moreover, copyright also protects parts of works, assuming that they embody the creative expression of the author.[109] However, like United States copyright law, copyright protection in the EU only extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts and last for the duration of the author's life plus 70 years.[110] The rights afforded to rights holders are enshrined in several directives of the EU—the most important being the InfoSoc Directive.[111] Articles 2-4 of the InfoSoc Directive provide for: (1) reproduction rights; (2) rights of communication to the public and making works available to the public; and (3) distribution rights, respectively.[112] Additionally, the rights to rental and lending as well as resale are elaborated in the Rental and Lending Rights Directive and Resale Right Directive.[113] Exceptions and limitations to copyright protection are found in Art. 5 of the InfoSoc Directive, however, as the directive makes clear they "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."[114]

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[108] *See* European Commission Trends and Developments in Artificial Intelligence—*Challenges to the Intellectual Property Rights Framework, Final Report*, p 70 (September 2020) ("[T]he requirement of human intellectual effort excludes from copyright protection outputs that are produced without human intervention").

[109] *See* Case C-355/12 *Nintendo Co. Ltd v. PC Box Srl* [2014] EU:C:2014:25 ("in so far as parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright"); *see also* Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569 ("[W]ords…considered in isolation, are not as such an intellectual creation of the author who employs them").

[110] *See e.g.* Case C-406/10 *SAS Institute v. World Programming Inc.* [2012] EU:C:2012:259 ("to accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development"); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

[111] InfoSoc Directive, *supra* note 76.

[112] Id. Art. 2-4.

[113] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

[114] InfoSoc Directive, *supra* note 76 at Art. 5(5).

CHAPTER IV: CONCEPTUAL JUSTIFICATIONS UNDERPINNING STATUTE OF LIMITATIONS

Every civil and criminal action has a corresponding limitations period, after which a potential plaintiff can no longer bring suit.[115] These statutes of limitations facilitate the effective resolution of legal disputes by ensuring that an action is commenced within a reasonable period of time.[116] Nevertheless, the purpose underscoring the need for a statute of limitations has been debated by legal scholars.[117] It has been held that the legal certainty they provide is "vital to the welfare of society."[118] Frequent justifications underscoring the need for a limitations period include: (1) providing fairness to defendants; and (2) ensuring that courts have sufficient evidence to decide cases accurately.[119] These justifications will be discussed below.

A. Providing Fairness to Defendants

Providing fairness to defendants is one of the most widely cited reasons given to justify the need for a statute of limitations."[120] The Supreme Court of the United States has held that statutes of limitations "are deigned to promote justice by preventing surprise through the revival of claims that have been allowed to slumber."[121] This ensures that plaintiffs and defendants alike have an opportunity to adequately prepare their respective claims and defenses while the facts surrounding their case are still fresh. Thus, in the absence of any time-limit, a plaintiff may elect to bring suit at a time more favorable to their cause and less advantageous to the defendant.[122]

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

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

[117] Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO.WASH. L. REV. 68, 74 (2005) ("The dearth of scholarship on the rationales for limitations periods and their concomitant exceptions is troubling. The absence suggests that inertia may be at work, a notion that Justice Holmes correctly found disturbing…").

[118] *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

[119] Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 457, 471–72 (1997).

[120] *Id*. at 483 ("One of the most powerful policies supporting limitation of actions is the concern that the passage of time will not only result in the deterioration of evidence, but that it will also allow the plaintiff to gain an unfair advantage over the defendant.").

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

[122] Ochoa & Wistrich, *supra* note 119, at 484 ("Permitting the plaintiff a one-sided option to delay before commencing suit allows the plaintiff to speculate on the extent to which evidence will deteriorate, as well as about whether that deterioration will adversely affect one side more than the other.").

From this perspective it is easy to see how delays in filing a claim can be prejudicial to defendants who may no longer have access to evidence that would exculpate them.[123]

Additionally, establishing a defense becomes more costly the more time has passed since the alleged infringement of a plaintiff's rights.[124] The statute of limitations instead, "establishes a deadline after which the defendant may legitimately have peace of mind."[125] For this reason, "the limitation of actions properly places the burden of going forward on the party seeking to alter the status quo."[126] Thus, as many cases have documented, one justification for the statute of limitations is to avoid unreasonably prejudicing defendants in their attempts to defend themselves.[127]

B. Ensuring Courts Have Sufficient Evidence

Ensuring that courts have sufficient evidence to properly determine the outcome of cases is arguably one of the highest functions that courts serve.[128] Delay by a plaintiff, in this regard, can negatively impact the accuracy of judicial outcomes.[129] Even in the absence of statute of limitations violations, "courts have long shown concern for evidence being lost as a result in delays in litigation."[130] "The longer the period between operative fact and legal judgment, the more likely it is that error will creep in: memories will fade, evidence will disappear or become

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[123] *Id.*; *see also Burns v. Bd. of Supervisors*, 315 S.E.2d 856, 859 (Va. 1984) ("[d]efendants could find themselves at the mercy of unscrupulous plaintiffs who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense.").

[124] Mark Marciszewski, *When Will It End? Why There is no Practical Statute of Limitations for Online Copyright Infringement and Why Libel Law Can Offer the Solution*, 27 RICH. J.L. & TECH., no. 1, 2020 (citing Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 457, 471–72 (1997)) ("Increased defense costs can incur during discovery due to the difficulty of finding older documents that may have been lost or deleted, the cost of tracking down witnesses that may have dispersed or deceased, and the task of reviving fading memories of witnesses.").

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

[126] Ochoa & Wistrich, *supra* note 119, at 486.

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

[128] Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J. L. & ECON. 1, 1 (1994) ("The degree of accuracy is a central concern of adjudication.").

[129] *See Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980) ("…there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.").

[130] Mark Marciszewski, *When Will It End? Why There is no Practical Statute of Limitations for Online Copyright Infringement and Why Libel Law Can Offer the Solution*, 27 RICH. J.L. & TECH., no. 1, 2020 (citing *Mo., Kan., & Tex. Ry. Co. v. Harriman Bros.*, 227 U.S. 657, 672 (1913) (observing that delays can result in the "death or disappearance of witnesses, destruction of documents, or failure of memory")).

unreliable."[131] Therefore, a plaintiff can also often be prejudiced by a delayed claim, when the evidence they need to sufficiently assert their rights are unavailable or have been discarded.[132] Although, some legal scholars are of the belief that perfect accuracy is more of an ideal than a reality,[133] "the passage of time is correlated with a wide variety of factors, each of which makes it less likely that a lawsuit will reach the correct outcome."[134] And because legal rules are designed to produce "the proper result in the majority of cases," the goal of a statute of limitations is meant to ensure the propriety of evidence for courts to fulfill their roles as adjudicative bodies.[135]

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[131] Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1182 (1986).
[132] Lambert, *supra* note 116 at 504 ("Statutes of limitations therefore do not necessarily always benefit the plaintiff or the defendant. Rather, if a case is timely filed, statutes of limitations benefit the side that has the evidence to win the case.").
[133] *See* JEROME FRANK, COURTS ON TRIAL:MYTH AND REALITY IN AMERICAN JUSTICE 14–16 (1949) (explaining that facts are merely guesses about the facts).
[134] Epstein, *supra* note 131 at 1183.
[135] Lambert, *supra* note 116 at 505-06.

CHAPTER V: COPYRIGHT STATUTE OF LIMITATIONS

This section will examine the varying approaches to copyright statute of limitations within the United States and Europe, followed by an examination of the two leading cases responsible for the divergent opinions as to the application of the discovery rule, namely, *Sohm v. Scholastic Inc.* and *Starz Entertainment, LLC v. MGM Domestic Television Distribution*. Thereafter, limitations period will be examined within France and Germany.

A. United States: 17 U.S.C. §507(b)

Congress first introduced a statute of limitations into the Copyright Act in 1957,[136] until which courts generally looked to state statutes to determine the appropriate limitations period.[137] Today, under United States federal law, the statute of limitations for civil copyright infringement actions is governed by 17 U.S.C. §507(b) and reads: "No Civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." [138] This vague language has necessarily left many questions open as to when a claim accrues, and as a result, varying case law has developed over the years.[139]

i. Measuring Three Years

A number of approaches have been developed to measure the three year time limit outlined in the Copyright Act. One line of case developed a "continuing wrong" theory, while others departed from this rational in favor of a "rolling three year" approach as to whether a claim had been timely initiated.[140] In 2014 the Supreme Court sided with latter approach in *Petrella v. Metro-Goldwyn-Myer, Inc,*.[141]

a. Continuing Wrong

The "continuing wrong" was developed in response to adjudicating issues regarding infringements that occurred over an extended period of time.[142] The issue was addressed in *Taylor v. Meirick* ("*Taylor*") , where the court held that when a series of infringing acts constitutes a continuing wrong, then it is only necessary that the last infringing act occurred

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[136] 3 Nimmer on Copyright § 12.05 *The Statute of Limitations* (2023); *see also* S.Rep. No. 1014, 85th Cong., 1st Sess., 2 (1957).
[137] See e.g., *Carew v. Melrose Music, Inc.*, 92 F. Supp. 971 (S.D.N.Y. 1950); *Local Trademarks, Inc. v. Price*, 170 F. 2d 715 (5th Cir. 1948); *McCaleb v. Fox Film Corp.*, 299 F. 48 (5th Cir. 1924).
[138] 17 U.S.C. §507(b).
[139] Nimmer, *supra* note 136.
[140] *Id.*
[141] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).
[142] Nimmer, *supra* note 136.

within the three-year statutory period in order for liability to attach to them all; in essence, if there is at least one appropriate infringement within the three year window from the time of filing suit, then all damages may be recovered by a plaintiff.[143]

Taylor involved the unauthorized copying of maps by Meirick, created by Taylor, for use in fishermen communities within the Illinois area.[144] Meirick made copies of the maps in 1976 and 1977, however, because suit was not filed until May 8, 1980, Meirick argued that any claim by Taylor was barred by the three-year statute of limitations.[145] The court clarified that there is a "general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with."[146] Judge Posner continued by elaborating:

> "The principle strikes a balance between the plaintiff's interest in being spared having to bring successive suits, and the two distinct interests, that statutes of limitations serve. One is evidentiary -- to reduce the error rate in legal proceedings by barring litigation over claims relating to the distant past. The other is repose -- to give people the assurance that after a fixed time they can go about their business without fear of having their liberty or property taken through the legal process…When the final act of an unlawful course of conduct occurs within the statutory period, these purposes are adequately served, in balance with the plaintiff's interest in not having to bring successive suits, by requiring the plaintiff to sue within the statutory period but letting him reach back and get damages for the entire duration of the alleged violation."[147]

The court held the "initial copying was not a separate and completed wrong but simply the first step in a course of wrongful conduct that continued till the last copy of the infringing map was sold by Meirick or with his connivance."[148] Nevertheless, Seventh Circuit did not attempt to define what a "continuing wrong" constitutes, and so that question is still open to interpretation.[149]

b. Rolling Three Years

The Nineth Circuit in *Roley v. New World Pictures, Ltd.,*("*Roley*") adopted what has been deemed a rolling concept of looking back to three years from the date of filing.[150] Thus, if suit is filed on June 21, 2023, recoverable damages are only those that have been sustained since June

[143] *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983).
[144] *Id*. at 1117.
[145] *Id.*
[146] Id. at 1118.
[147] *Id*. at 1119. (internal citations omitted)
[148] *Id.*
[149] Nimmer, *supra* note 136.
[150] *See Roley v. New World Pictures, Ltd.*,19 F.3d 479, 481 (9th Cir. 1994).

21, 2020.[151] Over the decades since *Roley*, more courts have aligned with its interpretation, rather than *Taylor*, and thus, the prevailing view has "become that the statute of limitations bars recover on any damage claim that accrued over three years prior to filing of suit."[152] In 2014, the Supreme Court effectively adopted this position in *Petrella v. Metro-Goldwyn-Mayer, Inc.* ("Petrella").[153]

Petrella concerned, primarily, whether "the equitable defense of latches (unreasonable, prejudicial delay in commencing suit) may bar relief on a copyright infringement claim brought within §507(b)'s three-year limitations period."[154] Plaintiff, Paula Petrella, sought damages for exploitation of Raging Bull, a critically acclaimed motion picture, based on the screenplay written by her father in 1963, which she acquired the rights to after his passing.[155] Petrella, in 1998 informed defendant, Metro-Goldwyn-Mayer ("Metro"), that exploitation of any derivative work, including Raging Bull, infringed the copyright now vested in her, and threatened, on several occasion, to take legal action.[156] Finally, in 2009, Petrella initiated suit against Metro, alleging that Metro "violated and continued to violate her copyright in the 1963 screenplay by using, producing, and distributing Raging Bull."[157] Petrella, however conceded that §507(b) precluded recovery of damages prior to the three years of filing suit and sought only damages that occurred on or after January 6, 2006.[158] Nevertheless, Metro argued that Petrella's claim was untimely barred by the equitable defense of latches. Unconvinced, Justice Ginsburg explained:

> "Section 507(b), it is undisputed, bars relief of any kind for conduct occurring prior to the three-year limitations period. To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, however, courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window."[159]

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[151] Nimmer, supra note 136.
[152] *Id.*
[153] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014) ("It is widely recognized that the separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete "claim" that "accrue[s]" at the time the wrong occurs. In short, each infringing act starts a new limitations period").
[154] *Id*. at 667.
[155] *Id*. at 673-74 ("[R]enewal rights reverted to his heirs, who could renew the copyrights unburdened by any assignment previously made by the author.").
[156] *Id*. at 674.
[157] *Id*. at 675.
[158] Id. at 675-76.
[159] *Id.*

Thus, the court gave credence to the rolling three-year statute of limitations, explaining that "[u]nder the [Copryight] Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is insulated from liability for earlier infringements of the same work." without fully ruling on that question.[160]

ii. Claim Accrual

The next question that §507(b) presents is: when does a claim accrue?[161] On the one hand, should it be determined subjectively, when a copyright holder uncovers the infringing conduct, or, on the other hand, objectively, commensurate with the time the infringement actually occurs.[162] These two diverging considerations are embodied in the Discovery Rule and Injury Rule, respectively.

a. Injury Rule

One case that champions the application of the injury rule is *Auscape International v. National Geographic Society* ("*Auspcape*").[163] In *Auscape*, plaintiff filed a complaint for copyright infringement on January 31, 2002, and thus, the court framed the initial inquiry as whether any infringements had occurred on or after January 31, 1999.[164] Finding that all infringements had ceased on or before 1996, the court then addressed plaintiff's argument that their claim was, nevertheless, timely.[165] In doing so, the court turned to the then recent *TRW v. Andrews* decision by the Supreme court which requires "examination of the statutory and legislative history in determining whether a discovery or injury rule should apply."[166] Finding that §507(b) does not itself provide any guidance, the court shifted its focus to the legislative

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[160] *Id*. at 671-72 (citing 3 M. Nimmer & D. Nimmer, Copyright § 12.05[B][1][b]) ("If infringement occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously. Thus, when a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder's suit ordinarily will be timely under § 507(b) with respect to more recent acts of infringement (i.e., acts within the three-year window), but untimely with respect to prior acts of the same or similar kind.") (internal quotations omitted).

[161] *Entous v. Viacom Int'l, Inc.*, 151 F. Supp. 2d 1150, 1156 (C.D. Cal. 2001) (holding that parties may later the time of accrual by mutual agreement).

[162] Nimmer, *supra* note 136.

[163] *Auscape International v. National Geographic Society*, 409 F. Supp. 2d 235 (S.D.N.Y. 2004).

[164] *Id*. at 241 ("The continuing infringement doctrine is unavailable in the Second Circuit. Thus, plaintiffs may recover only for acts of infringement that occurred within the three years next preceding suit unless, of course, the cause of action accrued later than the infringement date or they can demonstrate that the statute of limitations has been tolled.").

[165] *Id*. at 242 ("Essentially, then, the issue is whether an infringement claim accrues at the time of the infringement (the "injury rule") or, as plaintiffs contend, when the plaintiff "knows or has reason to know" of the injury upon which the claim is based (the "discovery rule")).

[166] *Id*. at 244.

history to illuminate whether congress intended the discovery rule or injury rule to apply.[167] One Senate Report examined by the court stated in relevant part:

> "All of [the] witnesses [at the hearings before the House Judiciary Committee on an identical bill in the 84th Congress] agreed to a 3-year uniform period, feeling that this represents the best balance attainable to this type of action. It was pointed out that due to the nature of publication of works of art that generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights. The committee agrees that 3 years is an appropriate period for a uniform statute of limitations for civil copyright actions and that it would provide an adequate opportunity for the injured party to commence his action."[168]

From this, judge Kaplan arrived at two conclusions: (1) the "goal of the uniform three year limitations period was to remove the uncertainty concerning timeliness that had plagued the copyright bar,"[169] and (2) "Congress, as well as participants in the hearings, intended the three-year period to begin at the date of infringement," because the public nature of infringements would provide "adequate opportunity" for the rightsholder to initiate suit.[170] Moreover, "Congress was well aware that the statute of limitations it was enacting would not necessarily allow for every wrong."[171] In short, the legislative history, according to Judge Kaplan, "makes it strikingly clear that Congress intended to adopt a three-year limitations period running from the date of the infringement, as a discovery rule would have defeated its overriding goal of certainty."[172] For those reasons, the court held that the claims "all accrued by the end of 1996 at

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[167] *Id.*
[168] *Id*. (citing *Copyrights - Statute of Limitations: Hearing on H.R. 781 Before the House Comm. On the Judiciary, Subcomm. 3*, 84th Cong. 40 (1955) ("*House Hearings*") (statement of Fulton Brylawski, Association of American Motion Pictures).
[169] *Id*. at 245 ("It seems unlikely that Congress intended that accrual of an infringement claim - and hence the length of the interval between an infringement and the statutory time bar - would depend on something as indefinite as when the copyright owner learned of the infringement.").
[170] *Id.* (citing *House Hearings* at 51 (letter statement of Sydney M. Kaye, lawyer and private citizen)) ("At the hearings, it was pointed out that 'copyright infringement by its very nature is not a secretive matter.' To the contrary, it is 'an act which normally involves the general publication of the work or its public performance.'")
[171] *Id*. (citing *House Hearings* at 48 (statement of Fulton Brylawski, Association of American Motion Pictures) ("Representative Crumpacker presented such a situation in a hypothetical question at the House Hearings, asking what would occur if a movie were shown to a small audience in a small town and then not shown again for three years. A representative of the Association of the American Motion Pictures responded, 'every performance of every moving picture is a separate infringement - if they occurred three years ago. That [*sic*] would be barred in three years.' In other words, whether the copyright owner was aware of the exhibition of the infringing movie was irrelevant; the statute of limitations for an infringement claim concerning that particular showing of the movie would expire three years after the movie was shown, regardless of when the copyright owner learned of the exhibition.").
[172] *Id*. at 247.

the latest and are untimely time-barred unless plaintiffs have raised a triable issue of fact which, if resolved in their favor, would toll running of the statute for a sufficient period."[173]

b. Discovery Rule

In *Polar Bear Productions, Inc. v. Timex Corporations* ("*Polar Bear*") the Nineth Circuit held that so long as a plaintiff filed suit within three years of discovering the infringement, it could recover damages occurring for past infringements.[174] Ironically, the resemblance to *Taylor v. Meirick*'s continuing wrong theory, which the court admonished in *Roley*, are quite similar, yet the Nineth Circuit came out differently on the issue with respect to the application of the discovery rule.[175] The Court distinguished *Roley* when it stated:

> "*Roley* interpreted the term 'accrue,' as it is used in § 507(b), to be the moment when the copyright holder 'has knowledge of a violation or is chargeable with such knowledge.' Synthesizing this definition of 'accrue' with the language of §507(b), the three-year clock begins upon discovery of the infringement. Because Roley was aware of the earlier infringement prior to the three-year limit for filing suit, those claims accrued outside the time allowed, and he was therefore prohibited from recovering damages for the earlier claims."[176]

Therefore, "if the copyright plaintiff was unaware of the infringement, and that lack of knowledge was reasonable under the circumstances," "it makes little sense, then, to bar damages recovery by copyright holders who have no knowledge of the infringement, particularly in a case like this one, in which much of the infringing material is in the control of the defendant."[177] Consequently, the "critical question" then, was when did the plaintiff "discover the infringement?"[178] Because the plaintiff initiated suit on August 3, 2000, and defendants did not provide any evidence contesting plaintiff's allegations that they discovered the infringement on August 9, 1997, the Court held that the plaintiff "commenced its suit 'within three years after the

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[173] *Id*. at 247-48.
[174] *Polar Bear Prods. v. Timex Corp.,* 384 F.3d 700 (9th Cir. 2004).
[175] Nimmer, *supra* note 136.
[176] *Polar Bear*, *supra* note 174 at 706 (citing *Roley v. New World Pictures, Ltd.*,19 F.3d 479, 481 (9th Cir. 1994)).
[177] *Id*. at 706-07 ("Without the benefit of tolling in this situation, a copyright plaintiff who, through no fault of its own, discovers an act of infringement more than three years after the infringement occurred would be out of luck. Such a harsh rule would distort the tenor of the statute.").
[178] *Id*. at 707.

claim accrued,'" and allowed them to recover damages.[179] The Nineth Circuit thus, ruled in agreement with an established trend in favor of a discovery rule.[180]

The application of the discovery rule, thus, follows a two-step process.[181] First, there is an assessment of when the injury actually occurred, followed by a determination of whether the accrual date should be postponed because the plaintiff did not discover the injury until a later date.[182] This second step of the discovery rule is still a matter of reasonableness, and courts generally assess a multitude of factors when assessing the circumstances under which a plaintiff "discovers or with due diligence should have discovered the infringement."[183] For example, courts look to the sophistication of the parties, and assess whether they may "rely on the discovery rule to resurrect time-barred copyright infringement claims."[184] Additionally, courts inquire into the circumstances of the plaintiff's case and assess whether they had "sufficient information of possible wrongdoing to place [them] on inquiry notice or to excite *storm warning* of culpable activity."[185]

iii. *Sohm* vs *Starz* Debate

It has been argued that the Supreme Court's decision in *Petrella* has "barred any recovery for infringement occurring prior to three years before the filing date—effectively overruling the discovery rule."[186] Nevertheless, courts have limited their reading of *Petrella* to its focus on whether the equitable defense of latches may bar relief for a copyright infringement claim made within the three-year statutory window under §507(b).[187] Therefore, some courts have taken the

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[179] *Id.* ("[W]e decline Timex's invitation to adopt an inflexible bar against recovery for infringement occurring three years prior to the filing of the copyright action.").
[180] Nimmer, *supra* note 136.; *see also William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3rd Cir. 2009) ("Although we have not previously addressed this issue, eight of our sister courts of appeals have applied the discovery rule to civil actions under the copyright Act.").
[181] Nimmer, *supra* note 136.
[182] *Id.*
[183] *Michael Grecco Prods. v. RADesign, Inc.,* 2023 U.S. Dist. LEXIS 106853.
[184] *Id*. at *7; see e.g., *Lixenberg v. Complex Media, Inc.*, 2023 U.S. Dist. LEXIS 4510, 2023 WL 144663, at *3 (S.D.N.Y. Jan. 10, 2023) (holding, where plaintiff had previously filed nearly 20 lawsuits, including two related to infringement of the same photograph at issue, that it should have discovered the alleged infringement within the limitations period); *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 U.S. Dist. LEXIS 52070, 2023 WL 2648027, at *3 (S.D.N.Y. Mar. 27, 2023) (holding, where plaintiff had previously filed more than 100 lawsuits, that it should have discovered the alleged infringements within the three-year limitations period.); *Gaffney v. Muhammad Ali Enters. LLC*, 2021 U.S. Dist. LEXIS 151090, 2021 WL 3542256, at *3 (S.D.N.Y. Aug. 10, 2021).
[185] *William A. Graham Co. v. Haughey*, 568 F.3d 425, 438 (citing *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (quoting *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002)) (emphasis in original).
[186] Sundine, *supra* note 11 at 47.
[187] *Id.*

position that *Petrella* has left the discovery rule untouched.[188] Despite some courts' willingness to recognize the discovery rule, in light of *Petrella*, disparate interpretations have developed, and a circuit split currently exists between the Nineth and the Second Circuits.[189]

a. Sohm

In 1986, Joseph Sohm, a professional photographer, entered into an agreement with Image Works, Inc. to issue limited licenses for use of Sohm's photographs.[190] Similar agreements were later entered into in 1994 with two further corporations which issued licenses to Scholastic, a publisher and distributor of children's books, for use of Sohm's photographs.[191] In 2016, Sohm initiated suit against Scholastic for copyright infringement, alleging that Scholastic had exceeded its licenses with respect to various works.[192] In its opinion, the District Court addressed, among other things, Scholastic's arguments that: (1) Sohm's action is barred by the statute of limitations; and (2) damages should be limited to three years prior to the commencement of litigation.[193] First, finding that Scholastic had failed to "adduce sufficient evidence from which a reasonable factfinder could conclude that plaintiffs' claims are untimely," the District court held that the discovery rule worked to maintain the timeliness of Sohm's action.[194] Second, after considering whether *Petrella* had abrogated Second Circuit precedent, and finding that it did not, the District Court rejected "Scholastic's argument that damages should be limited to three years before the filing of this case."[195]

[188] *Petrella*, *supra* note 141 at 670 n. 4 ("Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a ''discovery rule,'' which starts the limitations period when ''the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'' William A. Graham Co. v. Haughey, 568 F.3d 425, 433 (C.A.3 2009) (internal quotation marks omitted). See also 6 W. Patry, Copyright § 20:19, p. 20–28 (2013) (''The overwhelming majority of courts use discovery accrual in copyright cases.'').
[189] Sundine, *supra* note 11 at 41.
[190] *Sohm v. Scholastic Inc.*, 2018 U.S. Dist. LEXIS 53490.
[191] *Id.* at 2.
[192] *Id*. at 4.
[193] *Id*. at 26-8.
[194] *Id*. at 27-8 ("Without identifying any information that would have *prompted* such an inquiry, however, Scholastic cannot simply rely on the passage of time to establish that Plaintiffs reasonably should have discovered any infringement. Scholastic has failed to meet its evidentiary burden to survive summary judgment on this affirmative defense.").
[195] *Id.* at 28-9 (citing *Energy Intelligence Grp., Inc. v. Scotia Capital (USA) Inc.*, No. 16 Civ. 0617, 2017 U.S. Dist. LEXIS 13102, 2017 WL 432805, at *2 (S.D.N.Y. Jan. 30, 2017) ("[U]nder no reasonable reading of *Petrella* could the opinion be interpreted to establish a time limit on the recovery of damages separate and apart from the statute of limitations.")).

On appeal, the Second Circuit revisited Scholastic's arguments.[196] It noted that "in light of the Supreme Court's direct and repeated representations that it has not opined on the propriety of the discovery or injury rule, it would contravene settled principles of *stare decisis* for this Court to depart from its prior holding."[197] Thus, the Circuit Court found that the District Court had not erred in its use of the discovery rule and held that "the district court properly rejected Scholastic's affirmative defense based on the Copyright Act's statute of limitations."[198] However, on the issue of whether damages should be limited to the three years prior to filing suit, the Court came out differently.[199] Using *Petrella* as its guidepost, the Second Circuit concluded that retrospective relief could only be obtained for the three years prior to filing suit and "'[n]o recovery may be had for infringement in earlier years.'"[200] Thus, the Second Circuit reversed the "district court's contrary conclusion," to limit plaintiff's recoverable damages.[201]

b. Starz

Starz Entertainment LLC ("Starz") provides original programming as well as licensed movies and television shows to its subscribers.[202] On July 26, 2013 and May 7, 2015, Starz entered into a licensing agreement (Library Agreement) with MGM Domestic Television Distribution LLC (MGM), granting Starz the "exclusive right to exhibit MGM-owned movies and television series on Starz's suite of services within the United States" for a specified period of time, ranging from months to years in some cases.[203] Furthermore, MGM warranted to Starz that "it would not exhibit or license to third parties any of the licensed content in violation of Starz's exclusive rights."[204] However, in August 2019, Starz discovered a film covered under the licensing agreement made available on Amazon Prime during Starz's exclusivity period.[205] After

[196] *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020).
[197] *Id*. at 50 n. 2 ("Contrary to Scholastic's contentions, the Supreme Court's recent decision in *Rotkiske v. Klemm*, U.S., 140 S. Ct. 355, 205 L.Ed.2d 291 (2019), does not persuade us to depart from this holding… the decision did not interpret the Copyright Act's statute of limitations… Accordingly, *Rotkiske* is inapposite here.").
[198] *Id*. at 50-1.
[199] *Id*. at 51 ("Despite not passing on the propriety of the discovery rule in *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the commencement of a copyright infringement action. Accordingly, we reverse the district court's contrary determination.").
[200] *Id*. at 52 (citing *Petrella,* 572 U.S. at 671, ('[u]nder the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence' and that 'the infringer is insulated from liability for earlier infringements of the same work.'")).
[201] *Id*.
[202] *Starz Ent., LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236, 1238 (9th Cir. 2022).
[203] *Id*. ("Together, the two library agreements provided Starz with the exclusive right to exhibit 585 movies and 176 television series episodes in exchange for about $70 million.").
[204] *Id*.
[205] *Id*.

conducting its own investigation and receiving cooperation from MGM, Starz uncovered hundreds of violation of its licensing agreements.[206] Subsequently, Starz filed suit against MGM alleging, among other things, 340 claims of direct copyright infringement.[207]

The key question, according to the court was to determine "when does a copyright infringement claim accrue?"[208] The court explained:

> "[A]s early as 1994 [in *Roley*], we both recognized the discovery rule in the specific context of cases where infringement and accrual happen simultaneously, and that when the copyright holder knew of earlier infringing acts, recovery was allowable only for infringing acts occurring within the three-year window before commencing suit. Our subsequent decision in *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004) (as amended), recognized the latter point—that *Roley* did not create a bar against recovery for acts of infringement that occurred prior to the three-year window. Rather, *Roley* held that a claim accrues at the moment when the copyright holder has knowledge of a violation or is chargeable with such knowledge, and therefore the three-year clock begins upon discovery of the infringement."[209]

Furthermore,

> "Without the benefit of tolling in this situation, a copyright plaintiff who, through no fault of its own, discovers an act of infringement more than three years after the infringement occurred would be out of luck. Such a harsh rule would distort the tenor of the statute. Section 507(b), like all statutes of limitations, is primarily intended to promote the timely prosecution of grievances and discourage needless delay. It makes little sense, then, to bar damages recovery by copyright holders who have no knowledge of the infringement."[210]

The Court then went on to address "whether *Petrella* imposed a damages bar separate from the statute of limitations," ultimately holding that it did not for several reasons.[211] First, the court reasoned that applying a separate damages bar that is dissociated from the Copyright Acts statute of limitations would eviscerate the discovery rule.[212] It noted that the licensing agreements between Starz and MGM covered hundreds of titles spanning various time periods, some of

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[206] *Id*. at 1239 (MGM provided Starz with a list of 136 movies and 108 television series episodes that had been licensed to other service providers…an subsequently identified nearly 100 additional movies").
[207] *Id*. (Starz's full allegations also included 340 claims of contributory copyright infringement, 340 claims of vicarious copyright infringement, one claim of breach of contract, and on claim of breach of the covenant of good faith and fair dealing.).
[208] *Id*.
[209] *Id*. at 1240 (internal quotations omitted).
[210] *Id*.
[211] *Id*. at 1242-44 ("We hold that the discovery rule for accrual allows copyright holders to recover damages for all infringing acts that occurred before they knew or reasonably should have known of the infringing incidents").
[212] *Id*. at 1244 ("There is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable. This case provides a textbook example of the absurdity of such a rule.").

which ended in 2013, which would have barred recovery for any damages that had taken place after 2016, and considering that Starz was not aware of any infringements until 2019, "[t]o the extent the discover rule 'saved' the claims, it was a pyrrhic victory."[213] Moreover, to recognize a damage bar would functionally render the discovery rule akin to the injury rule.[214] Second, the court disagreed that Petrella created a damage bar separate from the statute of limitations because the ruling in that case concerned only the injury rule.[215] Third, §504 of the copyright act which deals with damages, "allows recovery for 'actual damages…as a result of the infringement,' 'any profits…attributable to the infringement,' or 'statutory damages for *all* infringements involved in the action."[216] Additionally, the court reasoned that if Congress intended to limit recoverable damages to the three-year period prior to filing suit it would have included it in §504 "which sets forth detailed instruction as to the proper calculation of actual and statutory damages and profits."[217] Fourth, the court reiterated its stance in *Polar Bear* and stated "unlike latches which serves to discourage a plaintiff from knowingly 'sleeping upon his rights,' where the discovery rule applies, the plaintiff reasonably does not know that he is in such a slumber."[218] Moreover, electing a three-year bar to damages would "incentivize the violation of the copyright holder's exclusive rights," which is counter to the purpose of the copyright act.[219] Finally, the court underscored the value of the discovery rule with respect to modern times and the ease of committing infringements coupled with the increasing difficulty of detecting them, and successfully litigating them.[220] Therefore, for the aforementioned reasons, the court concluded that "[n]either the text of the Copyright Act nor *Petrella* imposes a three-year damages bar in a discover case."[221]

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[213] *Id.*
[214] *Id.*
[215] *Id*. at 1245-46 ("Plainly the Court's lookback language was simply a shorthand for the statute of limitations laid out in §507(b) in incident of injury cases—where infringement and accrual occur simultaneously.").
[216] *Id*. at 1246 (citing 17 U.S.C. §504) (emphasis in original).
[217] *Id*.
[218] *Id*. (citing *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004)).
[219] *Id*.
[220] *Id*. (citing Br. of Amici Curiae The Authors Guild, Inc. and Other Artists' Rights Organizations in Sup. Of Pl.-Appellee & Affirmance at 3.); *see also William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009) ("Technological advances such as personal computing and the internet have [made] it more difficult for rights holders to stridently police and protect their copyrights." (internal quotation marks and citation omitted)).
[221] *Id*. at 1246-47 (Because Starz brought its claim within three years after its claim accrued, Starz is not barred from seeking damages for all acts of infringement.").

B. Germany & France

The 27 member states of the European Union provide for temporal limitations of civil claims, however these vary greatly among member states with respect to the length of the time limit, when the period begins to run, and what events suspend or interrupt the period.[222] Laws applicable to specific claims also govern the limitations period.[223] This section will examine limitations periods with respect to copyright law provided for by German and French law as examples as to how the limitations period is applied within the European Union as it is an area that remains unharmonized.

Under The German Copyright Act (*Urheberrechtsgesetz* – UrhG) Section 102 states that "the provisions of Book 1 Division 5 of the Civil Code apply accordingly in respect of the limitations period regarding claims on account of an infringement of copyright or another right protected under this act."[224] Under German Civil Code (*Budesgesetzblatt* – BGB) Section 195 the standard limitation period for bringing suit for an infringement is three years.[225] Furthermore, Section 199 states in relevant part:

> "(1) Unless another commencement of limitation is determined, the standard limitation period commences at the end of the year in which:
> 1. the claim arose and
> 2. the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if they had not shown gross negligence…
> (3) Other claims for damages become statute-barred
> 1. notwithstanding knowledge or a grossly negligent lack of knowledge, 10 years after they arise and
> 2. regardless of how they arose and of knowledge or a grossly negligent lack of knowledge, 30 years from the date on which the act, breach of duty or other event that caused the damage occurred.
> The period that ends first is applicable."[226]

Thus, claims for copyright infringement are generally held to be three years unless the copyright holder can demonstrate that the 10 year or even 30 year bar should apply. Section 199 appears to

[222] European-justice, *Time limits on procedures*, https://e-justice.europa.eu/279/EN/time_limits_on_procedures (Last accessed Jul. 18, 2023).
[223] *Id*.
[224] Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 25 of the Act of 23 June 2021 (Federal Law Gazette I, p. 1858), §102 Limitation Period.
[225] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515), §195 Standard limitation period.
[226] *Id*. §199.

provide a statutory discovery rule provision that ultimately sets a maximum cap for the period in which a claim for damages remains viable. The Federal Court of Justice (*Bundesgerichtshof* – BGH)[227] has stated that a showing of gross negligence that would necessitate a starting of the limitations period under Section 199(1) No. 2 only applies in situations where a plaintiff neglects obvious concerns that would be apparent to everyone, but is not applicable where the plaintiff is ignorant of facts giving rise to his claim.[228]

Under French law, Article 2224 of the French Civil Code (*Code Civil*) provides that "[p]ersonal or movable actions are prescribed by five years from the day on which the holder of a right knew or should have known the facts allowing him to exercise it."[229] The French Supreme Court (*Cour de Cassation*) has previously clarified that "the limitation period for a liability action runs from the time when the damage is manifested and not from the time when the fault is committed."[230] Thus, an action for copyright infringement can be brought more than five years after the injury occurred if the plaintiff only later became aware that their rights had been infringed. However, the five-year floating limitations period is also qualified by Article 2232 which prescribes a maximum time limit of twenty years to initiate suit.[231]

[227] Bundesgerichtshof, https://www.bundesgerichtshof.de/EN/Home/homeBGH_node.html (last accessed Jul. 19, 2023) ("The Federal Court of Justice (Bundesgerichtshof – BGH) is Germany's highest court of civil and criminal jurisdiction").
[228] BGH, judgment of 13.12. 2022 - VI ZR 1186/20 - OLG Naumburg.
[229] C. civ. Book III, Title XX, Chapter II, Section 1, Item 2224 (Modified by LAW n°2008-561 of June 17, 2008 - art. 1).
[230]*See e.g.* Cour de Cassation 27.02.2020 no. 18-24008.
[231]C. civ. Book III, Title XX, Chapter II, Section 1, Item 2232 (Amended by LAW n°2016-1087 of August 8, 2016 - art. 4) ("The postponement of the starting point, the suspension or the interruption of the prescription cannot have the effect of bringing the period of the extinctive prescription beyond twenty years from the day of the birth of the right."); *see also* Cour de Cassation 1 July 2015, no. 14-16.555; Cour de Cassation 26 January 2012, no. 10-21.529.

CHAPTER VI: REMEDIES FOR INFRINGEMENT

The following sections examines remedies for copyright infringement under US and EU Law.

A. 17 U.S.C §504

Under United States law, an infringer of copyright is liable for either (1) actual damages and any additional profits, or (2) Statutory Damages.[232] §504(b) provides:

> "The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."[233]

More interestingly, §504(c)(1) states, in relevant part:

> "[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work…in a sum of not less than $750 or more than $30,000 as the court considers just."[234]

With respect to determining the amount of statutory damages to be awarded, a trial courts has wide discretion which is "constrained only by the specified maxima and minima."[235] Nevertheless, courts generally consult a non-exhaustive list of factors which include: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.[236] Courts have also "consistently held that a statutory damages award three times the amount that the plaintiff would have received in licensing fees is appropriate under §504(c)."[237]

In cases where the plaintiff is successful in demonstrating that the infringement was willfully committed, "the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000."[238] Such a statutory rule, as noted by the Supreme Court, "is designed

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[232] 17 U.S.C. §504(a).
[233] 17 U.S.C. §504(b).
[234] 17 U.S.C. §504(c)(1).
[235] *Werner v. Evolve Media, LLC*, 2020 U.S. Dist. LEXIS 126589 (C.D. Cal. June 22, 2020) (citing *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)) (original quotations omitted).
[236] *Broad. Music, Inc. v. Prana Hospitality, Inc.*, 2016 U.S. Dist. LEXIS 7270 (S.D.N.Y. January 21, 2016).
[237] *Broad. Music Inc. v. Paden*, 2011 U.S. Dist. LEXIS 143801 (N.D. Cal. December 14, 2011).
[238] 17. U.S.C. §504(c)(2).

to discourage wrongful conduct."[239] "Willful infringement is not only knowledge on the defendant's part that what it did was infringement but also reckless disregard of the practice of protecting creativity, the very purpose of copyright."[240] However, even upon finding an infringement to be willful, "the Court does not always impose statutory maximum damages."[241]

On the other hand, if the defendant sustains their burden of proof that they "were not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200."[242]

B. DIRECTIVE 2004/48/EC

Directive 2004/48/EC on the Enforcement of intellectual property rights came into force in the European Union on April, 29, 2004.[243] The Council recognized that intellectual property "is an essential element for the success of the Internal Market," and effective protection of those rights is not only congruent with promoting innovation and creativity, "but also for developing and improving competitiveness" within the European Union.[244] Therefore, "the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market."[245] Furthermore, the purpose of the Directive is to "approximate legislative systems so as to ensure a high, equivalent and homogenous level of protection in the Internal Market."[246] In this sense, The Enforcement Directive is meant to establish the minimum legal protection afforded to intellectual property rights within the EU but does not foreclose Member States from establishing additional penalties or protections.[247]

At a very broad level, the Directive concerns "the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights."[248] This necessarily includes

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[239] *F. W. Woolworth Co. v. Contemporary Arts*, 73 S. Ct. 222, 97 L. Ed. 276 (1952).
[240] *See Sadowski v. Diverse New Media Corp*, 2023 U.S. Dist. LEXIS 21791 (2023) (Holding defendant's copying of plaintiffs photographs willful infringement even where plaintiff proved no actual damages).
[241] *Banilla Games, Inc. v. Hines*, 2022 U.S. Dist. LEXIS 211019 (citing UMG Recordings, Inc. v. Kurbanov, No. 1:18cv957, 2021 U.S. Dist. LEXIS 250844, 2021 WL 6492907, at *8-10 (E.D. Va. Dec. 16, 2021)).
[242] 17 U.S.C. §504(c)(2).
[243] Directive 2004/48/EC, *supra* note 77.
[244] *Id*. Recital (1).
[245] *Id*. Recital (3).
[246] *Id*. Recital (10).
[247] *Id*. Art. 2; *see also* Krystyna Szczezepanowska-Kozlwska, *Damages and legal costs under the Enforcement Directive in light of rulings of the European court of Justice*, ERA Forum 567, 568 (2023) (available at https://doi.org/10.1007/s12027-023-00742-z).
[248] Directive 2004/48/EC, supra note 77, Art. 1.

the sharing of relevant evidence that is expected to be preserved throughout trial.[249] Additionally, parties may seek injunctions to "prevent any imminent infringement,"[250] Further "corrective measures" are provided for by Article 10 and allows an applicant to recalls and definitive removal of goods from the "the channels of commerce," as well as destruction of goods in some cases.[251]

Article 13(1) concerns damages where the infringer knew of the unlawfulness of their action and provides two means for calculating damages. In relevant part, judicial authorities shall:

> "(a) …take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or
> (b) as an alternative…they may…set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question"[252]

It has been argued that the wording of Art. 13 gives rise to a question whether "the determination of damages in the form of a hypothetical royalty is merely subsidiary," or whether it is simply an alternative.[253] This was noted in the *Stowarzyszenie Olawska Telewizja Kablowa* (*OTK*) case by Advocate General Sharpston who suggested that the principle way of determining damages is to establish the relevant remuneration by an analysis of the totality of the circumstances where as a hypothetical lump sum should be an exception.[254] Resorting to a lump sum payment would mean, however, that rightsholder was unable to "demonstrate the value of the loss which determines the damages."[255] Thus, the "question arises as to whether the determination of compensation on the basis of a hypothetical license fee at all requires establishing that damage has occurred."[256] Notwithstanding this question, how should a hypothetical royalty be

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[249] *Id*. Art. 6-7.
[250] *Id*. Art. 9(1)(a), (2) ("In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets."); *see also Id*. Art. 11.
[251] *Id*. Art 10.
[252] *Id*. Art. 13(1).
[253] Kozlwka, *supra* note 247 at 569.
[254] Case C- 367/15 OTK, EU:C:2017:36; *Opinion of Advocate General*, EU:C:2016:900, para. 36.
[255] Kozlwka, *supra* note 247 at 569.
[256] *Id*.

calculated? Although one might believe that it would be determined by "objective market conditions," this assumption may not be correct in light of the wording of Directive 2004/48 which makes the rightsholder the point of reference for determining the damage.[257] Moreover, the Court of justice has suggested in *OTK* that the rightsholder is to be compensated in full:

> "In the light of the objectives of Directive 2004/48, the first subparagraph of Art. 13(1) of that Directive must be interpreted as establishing the principle that the calculation of the amount of damages to be paid to the holder of the intellectual property right must seek to ensure that the latter is compensated in full for the "actual prejudice suffered" by him, which also includes any moral prejudice."[258]

Thus, the court of Justice suggests that even in cases where a hypothetical royalty payment is concerned, prejudice to the rightsholder should be considered in order to establish the remuneration that would compensate them in full.[259]

Art. 13(2) also provides guidance to establishing the remuneration to be paid in the case of non-willful infringements and states, "[w]here the infringer did not knowingly, or without reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established."[260] Although Art. 13(2) will likely have limited application, it still provides a rightsholder with an alternative means of recovering ill-gotten profits obtained by an infringer.[261]

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[257] *Id*. at 570.
[258] Case C- 367/15 OTK, EU:C:2017:36, para. 25.
[259] Kozlwka, *supra* note 247 at 571.
[260] Directive 2004/48/EC, *supra* note 77, Art. 13(2).
[261] Kozlwka, supra note 247 at 577.

CHAPTER VII: LIABILITY LIMITATIONS FOR ONLINE SERVICE PROVIDERS

For over two Decades, the legal framework of the European Union and the United States has provided for liability limitation for Online Service Providers (OSPs) that shield them from the acts relating to the content they store for their users.[262] There are at least two arguments in favor of having this type of exemption.[263] First, "the content in question is by definition not their own," and thus, OSPs do not, at least initially, control the content or may not necessarily have knowledge of its existence.[264] Second, the quantity of user content that is uploaded to popular websites and social media platforms like YouTube, Facebook, Instagram, and Twitter. is so vast that it makes it difficult on the OSPs' part to monitor for illegal or infringing content.[265] To quote the United States Supreme Court, it would be "altogether unreasonable to demand so near an approach to omniscience" from OSPs.[266]

The following section will discuss legislation in the United States and the European Union respectively, on how each jurisdiction has dealt with the issue of liability limitation for OSPs.

A. Digital Millenium Copyright Act

Congress enacted the Digital Millennium Copyright Act in 1998 "in an effort to adapt copyright law to emerging digital technologies that potentially could be used to exponentially increase infringing activities online."[267] Title II of the DMCA, titled "Online Copyright Infringement Liability Limitations Act," added §512 to the Copyright Act "in order to limit the liability of providers of Internet access and online services that may arise due to their users posting or sharing materials that infringe copyrights."[268] Effectively, the DMCA requires OSPs to cooperate with copyright owners to address online infringements by their users, reflecting the "grand bargain between creative content-producing industries and Internet companies that seeks

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[262] Folkert Wilman, *The Eu's system of knowledge-based liability for hosting services providers in respect of illegal user content—between the e-Commerce Directive and the Digital Service Act*, JIPITEC,12, 317 (2021).
[263] *Id*. at 322.
[264] *Id.*
[265] *Id.*
[266] *Smith v California*, 361 U.S. 147, 153-54 (1959).
[267] Brian T. Yeh, *Safe Harbor for Online Service Providers Under Section 512(c) of the Digital Millennium Copyright Act*, CRS Report (2014); *see Technology Center v Netcom,* 907 F.Supp. 1361 (1995) (billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network" and that it is "practically impossible to screen out infringing bits from non-infringing bits"); see also H.R. Rep. No. 105-551, pt 1 (1998), 11 (noting that the bill that was to become Section 512 DMCA essentially codifies the ruling in *Netcom*).
[268] Brian T. Yeh, *Safe Harbor for Online Service Providers Under Section 512(c) of the Digital Millennium Copyright Act*, CRS Report (2014).

to both promote investment in the Internet and protect copyright holders' intellectual property rights."[269] The alternative to such a system "could expose [OSPs] to claims of secondary liability, such as contributory and vicarious copyright infringement."[270] Therefore, the safe-harbor that §512 grants to OSPs is "essential to the business model" that they provide.[271] The Safe harbor corresponds to four operations of a service provider: (1) transitory digital network communications, (2) system caching, (3) storage of information on systems or networks at direction of users, and (4) information location tools.[272]

In order to qualify for the safe harbor provision, a party must first conform to the statutory definition of a "service provider," for which the DMCA provides two distinct definitions.[273] Under 17 U.S.C. §512(a) a "service provider" is narrowly defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."[274] For all other sections, a "service provider" is more broadly defined as "a provider of online services or network access, or the operator of facilities therefor."[275] Next, a service provider must have (1) adopted, reasonably implemented, and informed subscribers and account holders of the service provider's policy to terminate users, in appropriate circumstances, of subscribers and account holders who are repeat infringers, and (2) accommodate, and not interfere with standard technical measures used by copyright holders to protect their works.[276] Lastly, a service provider must comply with the specific requirements of the respective safe harbor provision they hope to fall under.[277]

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[269] *Id.*
[270] *Id*. at 1,3 ("Because online service providers often solely provide the means for their users to upload and distribute content, rather than providing the content themselves, service providers are more likely to be charged with secondary infringement liability rather than sued for direct infringement."); *see also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (secondary infringement has its roots in tort law and the notion that one should be held accountable for directly contributing to another's infringement.).
[271] *Id*. at 2 (many popular Internet businesses today [include the]: "storage of information on systems or networks at direction of users.").
[272] 17 U.S.C. § 512(a)-(d).
[273] Yeh, *supra* note 267 at 5.
[274] 17 U.S.C. §512(k)(1)(A).
[275] 17 U.S.C. §512(k)(1)(B).
[276] 17 U.S.C. §512(i)(1)(A)-(B).
[277] 17 U.S.C. § 512(a)-(d).

B. 17 U.S.C. §512(c)

Since the DMCA came into force, OSPs have relied on §512(c) to shield them from infringement suits lodged against them by copyright holders—alleging the OSPs of direct, vicarious, and contributory copyright infringement.[278] Therefore, it is appropriate to examine this particular subsection in more detail. §512(c) states, in relevant part:

> "(1) In general. A service provider shall not be liable for monetary relief…for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
> (A)
> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
> (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
> (C) upon notification of claimed infringement…responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[279]

In *Viacom International, Inc. v. YouTube, Inc.* ("*Viacom*"), one of the first cases dealing with the scope of §512(c), Viacom argued, among other things, that YouTube did not qualify for the safe harbor because it does not merely store user generated content, but rather replicates, transmits, and displays that content in the form of videos.[280] The Court, however, found Viacom's argument unpersuasive, explaining that the statutory definition of "service provider" would necessarily include the "collateral scope" of "storage" that YouTube offers.[281] Additionally, Viacom charged YouTube with actual knowledge of the infringing activities of its users because of its awareness that infringing activity was taking place on its platform.[282] The

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[278] Yeh, *supra* note 267 at 9.
[279] 17 U.S.C. §512(c)(1)(A)-(C).
[280] *Viacom Int'l, Inc. v. YouTube, Inc.*,718 F. Supp. 2d 514, 526-27 (S.D.N.Y. 2010).
[281] *Id.* ("Surely the provision of such services, access, and operation of facilities are within the safe harbor when they flow from the material's placement on the provider's system or network: it is inconceivable that they are left exposed to be claimed as unprotected infringements."); *see also UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1016 (9th Cir. 2013) (finding that the § 512(c) safe harbor extends to infringement resulting not just from the provider's storage of UGC, but also any services that the provider operates to facilitate users' access to the material).
[282] *Viacom, supra* note 280.

Court, too, found this argument unpersuasive, stating, "the tenor of the foregoing provisions is that the phrases 'actual knowledge that the material or an activity' is infringing, and 'facts or circumstances' indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items."[283] Thus, a general awareness of a particular practice of infringement undertaken by users is not enough.[284] A similar argument was attempted in *UMG Recordings, Inc. v. Shelter Capital Partners LLC*.[285] In that case, UMG argued that the defendant, a video sharing network, by hosting music videos on its platform, for which it knew it had no license, had actual knowledge of infringing materials on its website.[286] Nevertheless, the Ninth Circuit reiterated that only "general knowledge that one's services could be used to share infringing material," does not impute actual knowledge of an infringement.[287]

In the event that "actual knowledge" is not present, plaintiffs have argued in the alternative under §512(c)(A)(ii) that circumstances should have alerted the OSPs to act to remove infringing content.[288] The Appellate Court in *Viacom* explained the distinction:

> "[T]he actual knowledge provision turns on whether the provider actually or subjectively knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person. The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor. Both provisions do independent work, and both apply only to specific instances of infringement."[289]

For example, in *Perfect 10 Inc. v. CCBill LLC*, even where the defendant hosting service was hosting websites with suspicious domain names like "illegal.net" or "stolencelebritypric.com" the Court noted that use of the terms "'illegal' or 'stolen' may be an attempt to increase their salacious appeal, rather than an admission" of their nature.[290] Furthermore, the Court refused to "place the burden" of determining the propriety or illegality of its users content on OSPs

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[283] *Id.* at 523.
[284] *Id.* ("to let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA.").
[285] *Id.*
[286] *Id*. at 1021.
[287] *Id*. at 1022.
[288] Yeh, *supra* note 267 at 13 ("The service provider's duty to remove material upon obtaining an "awareness" of apparent infringing activity is the so-called "red flag" provision of the DMCA").
[289] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (internal quotations omitted).
[290] *Perfect 10 Inc. v. CCBill LLC* 488 F.3 1102, 1114 (9th Cir. 2007).

directly.[291] This approach is congruent with placing the onus of policing work on the copyright holder rather than on the OSPs.[292]

§512(c)(1)(B) also specifies that for OSPs to be eligible for the exemption it must not derive a financial benefit where it has the right and ability to control the infringing activity.[293] It is, however, not enough to demonstrate that the OSPs had the ability to block access or remove infringing material, rather, courts have required "something more" which demonstrates the OSPs ability to exert "substantial influence on the activities of the users.[294] For example, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.* the requisite control was held to be present by the court where the service provider had established a monitoring program where its agents received "detailed instructions regard[ing] issues of layout, appearance, and content," and where the service provider forbade particular content and refused access to users who failed to comply.[295]

Given the foregoing discussion of §512(c)'s application by courts, it is not unsurprising to discover that rightsholders have been frustrated with what they deem to be an "outdated" provision.[296] the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on March 13, 2014, regarding §512, in which it heard testimony regarding the degree to which the safe harbor is, or is not, operating well.[297] At the hearing, rights holders argued that §512 placed too much burden on them to police their works on the internet with little responsibility on OSPs to provide assistance.[298,299] OSPs argued for the status quo with regards to §512 and that private industry solutions, such as content filtering systems, could address the concerns of rightsholders.[300]

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[291] *Id.*

[292] *Id*. at 1113 ("The DMCA notification procedures place the burden of policing copyright infringement— identifying the potentially infringing material and adequately documenting infringement— squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider"); *see also* 17 U.S.C. §512(m).

[293] 17 U.S.C §512(c)(1)(B).

[294] *Viacom*, *supra* note 289 at 38.

[295] *Perfect 10, Inc. v. Cybernet Ventures, Inc,* 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002).

[296] Nathan Pollard, *Panelists Debate Intentions of DMCA and Who Is Liable Under YouTube Decision,* BNA'S PATENT, TRADEMARK & COPYRIGHT JOURNAL, Aug. 5, 2011

[297] *Section 512 of Title 17: Hearing Before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet,* 113th Cong., 2d Sess. (2014).

[298] *Id.* (statement of Professor Sean M. O'Connor).

[299] *Id.* (opening remarks by Chairman Goodlatte) (copyright owners are increasingly facing a scenario that simply wasn't anticipated during the enactment of 512 – the need of copyright owners to send a voluminous amount of notices seeking removal of infringing content followed by the almost immediate reappearance of the same infringing content).

[300] *Id.* (statement of Katherine Oyama, Senior Copyright Policy Counsel, Google).

C. E-Commerce Directive

The legal basis for exempting OSPs from liability for infringements concluded by their users within the European Union was first enshrined in Article 14 of the e-Commerce Directive ("ECD"), which was adopted in 2000.[301] Art. 14 itself, was inspired by §512(c) of the DMCA, and thus its requirements are very similar.[302] Prior to its adoption, the OSPs were suffering from "divergence in legislation and legal certainty as to which national rules apply."[303] The Commission feared that "this could lead to the Community losing out to competition from more integrated markets, such as the USA."[304] Thus, the Commission, with ECD Art. 14, has tried to strike a balance between "consumer-friendly and pro-competitive legal framework…to guarantee both freedom of expression and an appropriate remuneration for professional creators."[305]

Art. 14(1) states, in relevant part:

> "1. Where an information society service[306] is provided that consists of storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored…on the condition that:
> (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances form which illegal activity or information is apparent; or
> (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information."[307]

A majority of Member States have implemented Art. 14 nearly to the letter, with respect to their national legislation, and most distinguish "actual knowledge" from "facts and circumstances from which illegal activity is apparent" as respective standards to impose criminal and civil liability on OSPs; the former being the requisite standard for criminal liability, and the

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301 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
302 Wilman, *supra* note 262 at 318-19 ("[M]any large online service providers active in the EU originate and continue to be based in the US. Their behaviour is therefore shaped by the country's legal set-up.").
303 ECD, supra note 301 at Recital 5.
304 *The E-Commerce Directive Article 14: Liability exemptions for hosting third party content*, Universitetet I Oslo Det juridiske fakultet (2011).
305 EU Commission, *Creative Content in a European digital single market: Challenges for the future. A reflection document of DG INFSO and DG MARKT*, Page 4. (2010).
306 ECD, *supra* note 301 at Recital 17 (An "information society service" is defined as "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of the service"); *see also* Directive 98/34/EC of the European Parliament and of the European Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.
307 ECD, *supra* note 301 at Art. 14(1).

latter for civil liability.[308] "Knowledge" has also been interpreted as knowledge to the underlying facts, as well as knowledge of the illegality of the content being posted on the OSPs servers.[309] OSPs lodged complaints that because of this, they will have to play the role of an "illegitimate judge" to "assess the unlawfulness of content—sometimes on the basis of vague private notice—to decide whether the information should be removed or access denied," which may prove difficult in an area of law such as copyright[310]

Furthermore, notification requirements to OSPs vary greatly among Member States.[311] Some have no formal requirements,[312] while others have detailed statutory procedures, which are paramount for a determination whether an OSP has obtained the requisite knowledge of both the underlying facts and the illegality of the content.[313] Therefore, in practice, "rights holders frequently submit notices in a variety of forms," however the main issue still remains assessing the "credibility" and "illegality" of the notice for OSPs who are charged with acting "expeditiously," in some cases "regardless of whether OSPs are sure about the legality of the content in question."[314]

D. Copyright and Related Rights in the Digital Single Market

Since the ECD came into force in 2000, the internet and the variety of ways that businesses engage with users has rapidly transformed, and thus, in light of these new developments, the Commission promulgated Directive 2019/790 on April 17, 2019 on copyright and related rights in the Digital Single Market to require more stringent obligations on the part of OSPs.[315] Of particular note is Art. 17, which essentially provides that "online content sharing service providers perform and act of communication to the public or an act of making available to the public…when it give the public access to copyrighted-protected work…uploaded by its users," and thus, OSPs "shall obtain an authorization from the rightsholder."[316] In the event that

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308 Verbiest, Thibault and Spindler, Gerald and Riccio, Giovanni Maria, Study on the Liability of Internet Intermediaries, Page 34 (November 12, 2007).
309 *See e.g.* BGH, 23.9.2003, VI ZR 335/02, NJW 2003, 3764.
310 Verbiest, supra note 308 at 37.
311 *Id.*
312 *Id.* ("[S]ome legal systems do not explicitly regulate any requirement for notifications—so that a mere private letter can sufficiently establish knowledge of an infringement").
313 *Id.*
314 *Id.*
315 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Recital 3.
316 *Id*. Art. 17(1).

authorization is obtained, "that authorization shall also cover acts carried out by users of the service."[317] Although the possible application of Art. 14(1) ECD is not ultimately ruled out, the Directive makes it clear that "limitation of liability established in Article 14(1) of Directive 2000/32/EC shall not apply to the situations covered by this Article."[318] In the event that no authorization from the rightsholder has been granted "online content-sharing service providers shall be liable for unauthorized acts of communication to the public…of copyright-protected works…unless the service provider demonstrates" they have made best efforts to obtain authorization and acted "expeditiously, upon receiving a sufficiently substantiated notice" from the rightsholder to disable access to, or remove the infringing content from their website.[319] Furthermore, Art 17(9) requires Member States to "provide that online content-sharing service providers put in place effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes."[320]

Art 17 of Directive 2019/790 has been criticized, and even faced opposition by the polish government, who challenged the article before the ECJ.[321] Because, Art. 17 seeks to establish a new "liability regime," the annulment of only Art. 17(4)(b)-(c)[322] would "result in the liability regime's being replaced by a regime that is both substantially different and significantly more favourable to those providers," and as a result, the court held that they could not be severed and that only its claim "seeking annulment of Article 17 in its entirety, is admissible."[323] The thrust of Poland's argument in seeking annulment of Art. 17 was that to carry out their obligations thereunder, online-content sharing services would have to implement filtering tools that would "constitute a limitation on the exercise of the fundamental right" of freedom of expression and information "guaranteed in Article 11 of the Charter."[324] On the other hand, the Parliament and Council, supported by Spain, France, and the Commission contended that Article 17 "comprises

[317] *Id*. Art. 17(2).
[318] *Id*. Art 17(3).
[319] *Id*. Art. 17(4)(a)-(c).
[320] *Id*. Art. 17(9).
[321] Case C-401/19, Poland v Parliament and Council [2022] ("By its action the Republic of Poland asks the Court, principally, to annul Article 17(4), point (b), and point (c)…in the alternative…to annul Article 17 in its entirety ").
[322]Directive (EU) 2019/790, *supra* note 315, Art. 17(4)(b)-(c) (point (b) concerns diligence and best efforts on the part of service providers "to ensure the unavailability of specific works" and point (c) concerns obligations on service providers to act "expeditiously" to disable access to or remove works from their website after receiving notification, as well as making efforts to prevent future uploads).
[323] Case C-401/19 para. 20-22.
[324] *Id*. para 23-24; *see also* Charter of Fundamental Rights of the European Union, Art. 11.

a comprehensive system of safeguards which preserves the right to freedom of expression and information of users of online content-sharing services and the fair balance between the rights and interests involved."[325] The ECJ agreed with the latter argument, and ultimately held that the "obligations imposed on online content-sharing service providers in Article 17(4)…do not disproportionately restrict the right to freedom of expression and information of users of those services," because the obligations only arise, as the court explained, after being notified by the rightsholder with the "necessary information with regard to that content."[326]

[325] Case C-401/19 para. 62.
[326] *Id*. para. 84, 89 ("Since the provision of undoubtedly relevant and necessary information is a precondition for finding service providers liable, those providers will not, in the absence of such information, be led to make the content concerned unavailable.").

CHAPTER VIII: POTENTIAL RESPONSES BY UNITED STATES RIGHTSHOLDERS

In light of *Sohm/Starz* and §512, the question: what rightsholders can do to protect their interests, is a very relevant one. Although rightsholders may have many options at their disposal, I would like to highlight two realistic possibilities: Engaging third parties and forum shopping.

A. Engaging Third Parties

Before litigation is even considered, rightsholders may likely choose to engage third parties that offer services to scan websites for unauthorized uses of their copyrighted materials. In doing so, rightsholders can better protect their interests by not having to rely on the uncertainties of the application of the discovery rule by federal courts in the US. For example, Tunesat is an online service that claims to be capable of scanning television shows and the internet for use of copyrighted music so that rightsholders do not lose out on the fees that they are legitimately owed.[327] TuneSat has previously provided their services to "help major music companies like SESAC, Universal, and Sony track their songs."[328] Although this certainly can help, and courts do not place a duty on rightsholders to police the internet,[329] their choosing to do so can also influence a court's decision in its application of the discovery rule, in the event an infringement is not timely identified.[330]

B. Forum shopping

Plaintiffs can, in general, bring a civil action in three locations: 1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located, 2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or, 3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such actions.[331] Because Copyright litigation is subject to federal jurisdiction, plaintiffs have a

[327]Tunesat, *Home Page*, https://tunesat.com/tunesatportal/home (last accessed Jul. 23, 2023).
[328] Davis Inman, *Tunesat Now Tracking Music For All Rights Holders*, https://americansongwriter.com/tunesat-now-tracking-music-for-all-rights-holders/ (2012) (last accessed Jul. 23, 2023).
[329] *Michael Grecco Prods. v. RADesign, Inc.,* 2023 U.S. Dist. LEXIS 106853.
[330] *Minden Pictures, Inc. v. Buzzfeed, Inc.*, 390 F. Supp. 3d 461 (S.D.N.Y. 2019) (dismissing a claim for copyright infringement as time barred where the plaintiff was "a seasoned litigator that has filed more than 36 lawsuits to protect its copyright," and it was unreasonable not to discover the infringement within the statutory window).
[331] 28 U.S.C. § 1391(b) (1)-(3).

variety of proper venues in which to bring suit.[332] A choice of forums invoking different substantive laws is the classic forum shopping paradigm, and is likely to persist within the field of copyright due to the *Sohm/Starz* dichotomy, which most certainly has an impact on the outcome of litigation.[333] Although the propriety of forum shopping to receive an advantage in law has been criticized, it ultimately is a practice that is to continue because of the current uncertainty surrounding the application of the discovery rule, in which rightsholders seek to recover ill-gotten gains by defendants who misappropriated their works without proper compensation[334] In some instances, however, plaintiffs will have no choice but to bring suit in an inconvenient forum because more favorable options lack jurisdiction over the defendant. And in any event, defendants who feel that they will be at a serious disadvantage defending an action for copyright infringement in a particular forum can always invoke the doctrine of *forum nonconveniens* in appropriate circumstances.[335]

[332] Sundine, *supra* note 11 at 49.
[333] Debra Lyn Bassett, *THE FORUM GAME*, 84 N.C.L. Rev. 333, 349, 2006 ("Differences in substantive law raise the spectre of differences in ultimate outcome based on the lawyer's choice of forum.").
[334] *Id*. at 337 ("Critics of forum shopping charge manipulation, wrongdoing, and abuse by lawyers (invariably plaintiffs' lawyers) to obtain a forum and substantive law to which they are not entitled.").
[335] 28 U.S.C. §1404(a); *see e.g. Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

CHAPTER IX: ANALYSIS

It is clear that the copyright schemes within the United States and the EU are similar in many respects. They have their origins in printing privileges that evolved over time, they protect only the expression of ideas in a tangible medium with similar neighboring rights to authorize reproduction as well as having similar term for copyright protection,[336] and, with respect to online infringements by users of OSPs, have similar statutory provisions that exclude OSPs from liability, although in recent years the EU has put a higher burden on OSPs.[337] Where they do differ, however, is with respect to limitations periods for bringing a claim for copyright infringement, which is relevant within the environment of the internet, where infringements are more commonplace than ever before and detection of said infringements, for that reason, is only becoming more difficult.

In the United States the discovery rule governs to set the relevant statute of limitations where a rightsholder only discovers that an infringement has occurred after the initial injury has already taken place. For that reason, it is a doctrine that has found increasing relevance in today's online-copyright landscape. Nevertheless, its application is not uniform. The two leading cases responsible for the current circuit split are *Sohm* and *Starz*.

In *Sohm*, the Second Circuit recognized the application of the discovery rule, however, it followed language in *Petrella* that delimited damages to the three years prior to suit. This ruling has many implications for rightsholder.[338] Rightsholders must now play a more active role in detecting infringements if they hope to recover damages for the unauthorized use of their works, even when they are not necessarily charged with a duty to do so. The rightsholder who is unaware of potential infringement may inevitably lose out on the opportunity to recover damages that they are owed.

On the other hand, the ruling in *Starz*, applies the discover rule in a way that allows the rightsholder to recover damages for the full term of infringement, even if they occurred more than three years prior to filing suit.[339] In many ways, this application underscores the purpose for having such a doctrine in the first place. It seems illogical to allow a claim to be brought and, nevertheless, foreclose the possibility of recovery from the outset. This is exactly what the *Starz* Court meant when it said that *Sohm*'s interpretation only provided a "pyrrhic victory" that essentially negates any sense remuneration.

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[336] 17 U.S.C. §302(a); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.
[337] 17 U.S.C. §512; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
[338] *See Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020).
[339] *See Starz Ent., LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022).

In light of the current landscape of the internet, and the difficulty presented to rightsholders to detect infringements, it would appear that the *Starz* interpretation of the discovery rule is the only interpretation that should be applied by courts. First, the history of the development of copyright in the United States has always been such as to encourage creation and creativity for the betterment of society as a whole. Moreover, its development has been to provide for the exploitation of works by rightsholders to derive monetary benefit therefrom.[340] By insisting that rightsholders may potentially have no recourse in suits that are brought more than three years after an infringement has occurred, this naturally would disincentives creation, and incentives piracy. Second, the legal insolation provided for by §512 has almost completely shifted the burden of detecting infringements onto copyright holders and, too, closes a potential avenue for rightsholders to recover damages for the unauthorized use of their works.[341] Third, the content sharing platforms like YouTube, Facebook, and Instagram where much of the infringement is taking place usually provides for time stamps that correlate to when content is uploaded to those platforms. Thus, it can be argued that, at least in some respects, the justifications for imposing a strict statute of limitations, namely the preservation of evidence, is satisfied when it comes to online infringements.

Nevertheless, because Congress and the Supreme court have not addressed the issue, this area of law remains uncertain. In light of this uncertainty, rightsholders are likely to engage third parties to protect their interests with respect to online infringements of their works. Additionally, rightsholders will likely attempt to avoid jurisdictions where *Sohm*'s interpretation of the discover rule applies, and in that sense, will engage in some form of forum shopping, which is generally frowned upon. Lastly, in the event that a rightsholder has no choice but to litigate in a jurisdiction where *Sohm* applies, copyright holders will, I argue, rely more heavily on statutory damages for claims that have exceeded the three year look back period prior to filing suit because of the additional damages that potentially may be recovered. Rightsholders will most certainly attempt to prove that infringements were willful in order to receive the benefit of the 3x damage multiplier allowed under §504.[342] Therefore, they can attempt to recover what they would have received in the event that they face a situation where they are foreclosed from recovering damages from outside the three years prior to filing suit. In that sense, statutory damages can be used to make the remainig viable claims more equitable, insofar as it mitigates the effects of the damages bar under *Sohm*.

[340] Khan, *supra* note 52.
[341] 17 U.S.C. §512.
[342] 17. U.S.C. §504(c).

In the European Union, unlike the court doctrines found in the United States, Member States have statutory provisions that govern the relevant statute of limitations. In Germany, there is a general three year statute of limitations, which may be extended to 10 or 30 years depending on whether the plaintiff only later became aware of facts that gave rise to their claim.[343] In France a general 5 year limitation period applies, with a similar absolute bar to recover after twenty years.[344] The remaining Member States undoubtedly provide for other variations. With that in mind, it would be beneficial for the Commission to look into providing harmonization in this area to further homogenize online copyright law within the EU, especially considering that the internet is a space without borders. Furthermore, this would provide increased stability and certainty to the functioning of the internal market and promote a true Digital Single Market.[345]

For US lawmakers, ensuring certainty in this area is also of critical importance. For that reason, they may attempt to clarify the intended application of the discovery rule by statute, as it applies to §507.[346] In the alternative, Congress may take inspiration from overseas by providing that the discovery rule should apply with an ultimate bar to recovery after a certain period of time, as is the case in Germany and France. As to what ultimate time-bar to recovery would be equitable is certainly up for discussion and is an area that requires further research to be conducted. Nevertheless, as the courts have made clear, there needs to come a point in time where the threat of suit is no longer looming in the air and a potential defendant can rest easy.[347] As it currently stands, even Starz's interpretation of the discovery rule is not without its fault. In essence, under *Starz*, it is at least theoretically possible that a claim could be brought for copyright infringement just before 70 years past the author's death if the then rightsholder only, at that time, "discovers" the infringement[348]. This too, does not seem to serve the purpose of a statute of limitations. For this reason, Congress should consider the issue and definitively prescribe the bounds for the application of the discovery rule, keeping in mind a balance of the relevant interests at stake.

[343] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515), §195, §199.
[344] C. civ. Book III, Title XX, Chapter II, Section 1, Item 2224 (Modified by LAW n°2008-561 of June 17, 2008 - art. 1), Item 2232 (Amended by LAW n°2016-1087 of August 8, 2016 - art. 4).
[345] *See* Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
[346] 17 U.S.C. §507(b).
[347] *United States v. Kubrick*, 444 U.S. 111, 117 (1979).
[348] *See* 17 U.S.C. §302(a).

CHAPTER X: CONCLUSION

In the United States, the application of the discovery rule in copyright cases has led to a circuit split, with two major cases—*Sohm* and *Starz*—highlighting contrasting interpretations. *Sohm*'s restrictive interpretation limits damages to the three years prior to the suit, putting the burden on rightsholders to actively detect infringements to recover damages. On the other hand, *Starz*'s interpretation allows rightsholders to claim damages for the full term of infringement, even if they occurred more than three years prior to filing suit. Both interpretations are not without their faults. Nevertheless, given the nature and abundance of online infringements, the Starz approach seems more equitable and appropriate in light of the foregoing discussion.

However, due to the lack of clear guidance from Congress and the Supreme Court, uncertainty remains in this area of copyright law. As a result, rightsholders may seek to engage third-parties to protect their interests in online infringement cases and will likely strategically choose fora to avoid jurisdictions where *Sohm'*s interpretation applies. Moreover, statutory damages may become a more prevalent tool in obtaining adequate recourse for rightsholders seeking claims beyond the three-year look-back period.

In the European Union, different Member States have varying statutory provisions governing limitations periods for copyright infringement claims. To foster a more harmonized online copyright law within the EU and enhance stability in the internal market, it would be beneficial for the Commission to explore harmonization in this area. For both US lawmakers and the European Commission, ensuring certainty and clarity in copyright law, particularly in the context of online infringements, where rightsholder only later becomes aware of claims, is crucial. US lawmakers may consider clarifying the application of the discovery rule by statute or adopting an ultimate bar to recovery after a specified period, drawing inspiration from models like those in Germany and France. The goal should be to strike a balance between the relevant interests at stake.

In Conclusion, current copyright schemes in the United States and the European Union calls for careful examination and adjustments to address the challenges posed by the internet while preserving the core principles of copyright protection. A balanced and well-defined approach to limitations periods with respect to copyright infringement claims will contribute to a more equitable and sustainable copyright system for authors, users, and society as a whole.

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ABSTRACT

The advent of the internet in the late 1900s opened doors to vast opportunities, providing billions of people access to an unprecedented collection of information. With its immense potential, the internet has empowered entrepreneurs, scientists, artists, and individuals alike. However, this digital revolution has brought along new challenges for authors and copyright holders, particularly in combatting unauthorized exploitation and piracy, resulting in substantial losses. Detecting copyright infringements amidst the continuous influx of data poses a major issue, making it crucial for rightsholders and lawyers to understand the limitations period for filing copyright infringement claims.

This paper examines the application of the discovery rule within the context of the digital age in the United States. While the discovery rule triggers a claim when the plaintiff becomes aware of the infringement, conflicting interpretations by U.S. courts regarding the extent of recoverable damages have arisen. The decision in *Sohm v. Scholastic Inc.* limits damages to the three years prior to filing suit, while the Ninth Circuit's ruling in *Starz Entertainment, LLC v. MGM Domestic Television Distribution* allows recovery for the entire period of infringement. This study supports the *Starz* interpretation and contends that *Sohm*'s approach is untenable and harmful to the financial interests of rightsholders.

Furthermore, this paper explores the copyright statute of limitations in the European Union, an area that remains unharmonized due to varying limitations periods set by individual Member States. By comparing French and German copyright laws to their U.S. counterpart, this study aims to ascertain the most favorable statute of limitations for copyright infringement claims and identify any disparities among national copyright laws. Additionally, understanding EU copyright limitations may offer insights for potential future efforts to harmonize EU copyright law, fostering a more integrated internal market.

Ultimately, this paper endeavors to offer valuable insights to legal practitioners, policymakers, and stakeholders grappling with copyright issues in the dynamic landscape of the internet.

ABSTRACT

Das Aufkommen des Internets Ende des 20. Jahrhunderts eröffnete ungeahnte Möglichkeiten und ermöglichte Milliarden von Menschen Zugang zu einer beispiellosen Fülle von Informationen. Mit seinem immensen Potenzial hat das Internet Unternehmer, Wissenschaftler, Künstler und Individuen gleichermaßen befähigt. Allerdings hat diese digitale Revolution für Autoren und Urheberrechtsinhaber auch neue Herausforderungen mit sich gebracht, insbesondere im Kampf gegen unbefugte Nutzung und Piraterie, was zu erheblichen Verlusten führt. Die Erkennung von Urheberrechtsverletzungen inmitten des kontinuierlichen Datenstroms stellt ein großes Problem dar, wodurch es für Rechteinhaber und Anwälte entscheidend ist, die Verjährungsfrist für die Einreichung von Urheberrechtsverletzungsansprüchen zu verstehen.

Diese Arbeit untersucht die Anwendung der "discovery rule" im Kontext des digitalen Zeitalters in den Vereinigten Staaten. Während die "discovery rule" einen Anspruch auslöst, sobald der Kläger von der Verletzung erfährt, sind konträre Interpretationen durch US-Gerichte bezüglich des Umfangs der erstattungsfähigen Schäden entstanden. Die Entscheidung in *Sohm v. Scholastic Inc.* begrenzt die Schadensersatzansprüche auf die drei Jahre vor Einreichung der Klage, während das Urteil des neunten US-Bundesberufungsgerichts in *Starz Entertainment, LLC v. MGM Domestic Television Distribution* eine Entschädigung für den gesamten Zeitraum der Verletzung ermöglicht. Diese Studie unterstützt die Interpretation von Starz und argumentiert, dass der Ansatz von Sohm unhaltbar und schädlich für die finanziellen Interessen der Rechteinhaber ist.

Des Weiteren erforscht diese Arbeit die Verjährungsfristen des Urheberrechts in der Europäischen Union, einem Bereich, der aufgrund unterschiedlicher Fristen in den einzelnen Mitgliedstaaten uneinheitlich ist. Durch den Vergleich der Urheberrechtsfristen in Frankreich und Deutschland mit denen in den USA soll ermittelt werden, welche Verjährungsfrist für Urheberrechtsverletzungsansprüche am günstigsten ist und ob es Unterschiede zwischen den nationalen Urheberrechtsbestimmungen gibt. Darüber hinaus kann ein Verständnis der EU-Urheberrechtsfristen dazu beitragen, Erkenntnisse für mögliche zukünftige Bemühungen zur Harmonisierung des EU-Urheberrechts zu gewinnen, um einen stärker integrierten Binnenmarkt zu fördern.

Letztendlich soll diese Arbeit wertvolle Erkenntnisse für Rechtsanwälte, Entscheidungsträger und Interessengruppen bieten, die mit Urheberrechtsfragen in der dynamischen Welt des Internets konfrontiert sind.