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The Discovery Rule at the Supreme Court: What to Watch with Warner Chappell Music, Inc. v. Nealy

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A review of key facts and arguments by the parties and amici in the Warner Chappell v. Sherman Nealy case which is before the U.S. Supreme Court after the emergence of circuit split following the Court's 2015 decision in *Petrella v. MGM*, to answer the following narrowed question presented: "Whether the Copyright Act's statute of limitations for civil actions, 17 U.S.C. 507(b), precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit."

Speakers:

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IMPORTANT TO NOTE: Warner Chappell's cert petition requested cert on this broader issue:

"Whether the Copyright Act's statute of limitations for civil actions, 17 U.S.C. 507(b), **precludes retrospective relief for acts that occurred more than three years** before the filing of a lawsuit."
[Cert = for narrower question of "under discovery accrual rule"]

[FACTS]

- Nealy alleged that Warner infringed upon their copyrights to certain musical works because Warner used the works based on invalid licenses to the copyrights that they obtained from third parties. Nealy asserted that they, not the third party licensors, were the owners of the copyrights.
- In the early 1980's Sherman Nealy and Tony Butler formed Music Specialist, Inc. (or MSI). Nealy financed the operation while Butler authored or co-authored the musical works considered in

this case. Between 1983 and 1986, before it dissolved as a corporation, MSI released an album and a number of singles (including the five musical compositions at issue).

- Subsequently, while Nealy was incarcerated from 1989 to 2008, Butler formed a new company 321 Music LLC and began licensing rights to MSI's musical works.
 - In February 2008, Atlantic entered into a license agreement with Butler and 321 Music to use the musical composition "Jam the Box" in "In the Ayer" by Flo Rida.
 - In July 2008: Artist Publishing separately entered into an agreement with Butler and 321 Music, permitting Artist Publishing to publish and administer Butler's entire catalog, including the musical compositions at issue. Warner began licensing the musical compositions on behalf of Artist Publishing.
- Upon Nealy's release from prison, he allegedly discovered third-party usage of MSI's catalog but did not file suit.
 - As of July 2008, Warner was listed in BMI's public records as the administrator of all musical compositions at issue. (Note, Nealy and MSI were also registered BMI members at that time). As a result, MSI did not receive any royalty checks for several of the musical compositions at issue. Nealy did, however, receive several statements and royalty checks for another musical composition that listed Warner Chappell as the publisher and administrator for that composition.
- Still, it wasn't until 2016, post-release from a second prison term that lasted from 2012 to 2015 that Nealy allegedly learned of the unauthorized transfers of rights when an associate told Nealy about Butler's agreement with Artist Publishing.

[PROCEDURAL HISTORY]

- In December of 2018, Nealy filed suit against Warner in the U.S. District Court for the Southern District of Florida. This was more than 10 years after the alleged infringement began and three years after Nealy allegedly had notice of the infringement.
- Pre-trial stipulation framed the case as an ownership dispute.
- Warner moved for summary judgment.
 - The district court granted summary judgment to Atlantic and partial summary judgment to Warner. The district court concluded that Nealy had not established ownership of the copyright in several of the musical compositions, including the only musical composition whose copyright Atlantic allegedly infringed. As to the remaining musical compositions, the court held that there was a factual dispute about when Nealy knew or should have known about the alleged infringement. However, the court further held that Nealy could not obtain retrospective relief for acts that occurred more than three years before they filed their lawsuit. The district court recognized that, under Eleventh Circuit precedent, it was required to apply the discovery rule to determine when Nealy's claims accrued. The district court nonetheless concluded, based on the Supreme Court's decision in *Petrella*, that the Copyright Act "itself takes account of the delay" by imposing a three-year look back period for monetary relief.

- On interlocutory appeal, the U.S. Court of Appeals for the 11th Circuit granted permission to appeal and reversed.
 - The Court of Appeals discussed the timeliness of Nealy’s action, stating that its precedents require the application of the discovery rule where, as in this case, the graveman of a copyright claim is ownership.
 - The Court of Appeals held that when a copyright plaintiff has a timely claim under the discovery accrual rule for infringement that occurred more than three years before the lawsuit was filed, the plaintiff may recover damages for that infringement- (this decision rejects the Second Circuit’s interpretation and aligns with the Ninth Circuit’s position).

DISCUSSION TOPICS: While there were so many various arguments on both sides by parties and amici, in the remaining time I will focus on some of the most common key arguments on both sides:

(1) How to construe and apply SCOTUS’s holding in *Petrella v. MGM*

(2) What is the proper application of the Discovery Rule, if any, and whether that is even an issue before the Court.

(3) Statutory Construction arguments.

(4) Legislative History -- AND --

(5) Some practical, industry and technology related arguments.

Before we go to that, a very quick overview of circuits applying the Discovery Rule:

- Ten (most) courts of appeals, including the Eleventh Circuit (this case), 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.
- **9th and 11th Circuits**, so long as a suit is timely filed under the “discovery rule” copyright holders may seek damages for infringement that took place over three years before suit was filed.
- **“Discovery Rule” – A claim accrues “When the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.”**
 - Note, the discovery rule contrasts with the **injury rule**: “a cause of action accrues at the time of the injury, regardless of when the copyright holder knew or should have known the injury”.
- **2nd Cir. after Petrella**, in *Sohm v. Scholastic*, 2nd Cir. construed Petrella to **limit damages to a 3-year lookback period no matter what (even if the Discovery Rule applies)** (*Sohm v Scholastic* (*Sohm alleged that Scholastic infringed 89 of his photographs by using them in excess of the number of print runs contemplated by the invoices that governed Scholastic’s licenses.*))

- **Compare to, 9th Cir. as in *Starz v. MGM*** which had no limitation re: damages when Starz discovered (via an employee) that MGM breached an exclusive license agreement by having films & tv series available on Amazon Prime.
- [Not going into it here but Warner Chappell argues that several circuits only apply the discovery rule in cases of repudiation of ownership and not necessarily infringement.]
 - Prof. Ochoa goes more into the different applications of the discovery rule in ownership vs. infringement actions [Ochoa, pg 15 +.]
- **Lower Courts:** And even within the 2nd Circuit in SDNY there is a variation among the lower district courts on treating the professionalism, industry experience, and use of technology by plaintiff as relevant to the “should have known” inquiry involved in the Discovery Rule (started in a case called *Minden Pictures v. Complex Media*).
 - **Central District of California courts** have an entirely different approach than the SDNY, concluding that the reasonableness of discovering copyright infringement is **generally a question of fact**.

I. HOW TO CONSTRUE AND APPLY PETRELLA

- **Reminder re: case: *Petrella v. MGM***, Supreme Court in 2014 resolved circuit split concerning applicability of laches to copyright claims.
 - SCOTUS **reversed 9th Cir.** ruling that Paula Petrella, daughter of “Raging Bull” co-author Frank Petrella, was barred by laches from suing MGM for copyright infringement of Petrella’s 1963 screenplay, even though she filed suit 18 years after renewing the copyright.
 - The Court held that **laches cannot be invoked** to bar Petrella’s claim for damages under § 507(b) of the Copyright Act’s three-year window b/c a plaintiff’s suit is ordinarily timely under § 507(b) with respect to acts of infringement within the three-year period - facts involved continued acts of infringement, home entertainment release -- Petrella sought relief only for acts of infringement occurring three years prior to the filing of the action.
- **WARNER CHAPPELL + AMICI (Petitioner):**
 - The Court **repeatedly** stated that Congress “**prescribed a three-year lookback limitations period,**” and that “**a successful plaintiff can gain retrospective relief only three years back from the time of suit.**” [Warner, p. 25]
 - Even though issue in case was whether laches applied to the Copyright Act, the **Court based its holding on the three-year limitation** in the statute of limitations to find that the **act already took account for delay and** this compromise was essential to the Court’s reasoning. [Warner, p. 26]
 - **AMICI - Association of American Publishers** agreed that Petrella’s holding endorsed the injury rule and added that in 2017 **Patent case (*SCA Hygiene*)**, **SCOTUS cited *Petrella* when stating that it’s not ordinarily true that a claim accrues upon discovery.**
- **NEALY + AMICI:**
 - **SHERMAN NEALY:**

- ***Petrella* did not concern** whether a plaintiff could recover for harm that occurred more than three years before the plaintiff filed a claim **if the discovery rule was applied** to the statute of limitations.
- ***Petrella* merely described the operation of the injury rule** and cases like it because *Petrella* was aware of the infringement for many years.
- Warner conflates the Court’s discussion of claim accrual under the injury rule with the availability of damages under the discovery rule. [Nealy, p.14]
- **Nealy argues: *Sohm v. Scholastic* (2nd Cir) misreads specific parts of *Petrella* out of context and when read in context the statements describe the operation of the separate accrual rule based on the specific facts of *Petrella*. The dicta in *Petrella* described what infringing acts are at issue in cases where the plaintiff does not rely on the discovery rule.**
 - Incidentally, NEUTRAL Amici Professor Tyler T. Ochoa (Santa Clara University School of Law) argues that: The discovery rule is only useful to allow a plaintiff to recover more than three years of damages. The *Sohm* decision is contradictory because it purports to use the discovery rule but limits the damages to three years. Had *Sohm* applied the injury rule, the result would have been the same. [Ochoa pg. 26]
- **AMICI: AUTHORS GUILD, National Society of Entertainment and Arts Lawyers (NSEAL), & United States Govt** (which was granted appearance at oral arguments) essentially argue the same stuff:
 - ***Petrella* did not address the statute of limitation but rather if laches was available as a defense** for copyright infringement.
 - The discussion in ***Petrella* was clearly dicta applicable only to the circumstances of that case** where the plaintiff had known of the infringement for several years. [Authors Guild, p. NSEAL, p. 10; US Govt., p. 25]

II. THERE IS NO UNIFORM DISCOVERY RULE AND DISCOVERY RULE APPLIED NARROWLY TO CASES OF FRAUD, LATENT DISEASE, AND MEDICAL MALPRACTICE | AND WHETHER IT IS APPLICABLE TO THIS CASE:

- **WARNER:**
 - The discovery rule is a **narrow rule**, an **equitable doctrine** that is read into the statute of limitations. The **Court has been cautious** when applying the discovery rule. [Warner, p. 33-37] [not for today but Warner covered a lot of historical context in the Warner Chappell brief relaying the origins of the discovery rule]
 - The Court has extended the discovery rule beyond the fraud context to cases involving latent disease and medical malpractice [Warner, p. 37-38]
 - The Court has never recognized a general discovery rule applicable in all cases. [Warner, p. 39]
 - There are **no facts in the current case that would trigger the use of the discovery rule.** The case does not involve fraud. [Warner, pp. 39-40]

- Infringement, especially for profit, is **public and not usually secretive**. [Warner, pp. 40-41]
- **AMICI – U.S. Chamber of Commerce: The Court’s rephrased question presented assumes the existence of a “discovery accrual rule applied by the circuit courts.” However, there is no uniform “discovery accrual rule applied by the circuit courts.”** Although some courts of appeals have recognized some version of a discovery rule, **courts differ** on both the **scope** and the **justification** for the rule.
 - The legal analysis governing the lookback period for damages is intertwined with the legal analysis governing the scope and justification for the discovery rule.
 - The **Court’s decision would provide clearer guidance if it decided the discovery rule’s scope rather than assuming the existence of a uniform “discovery accrual rule applied by the circuit courts.”**
- **NEALY + AMICI:**
 - **Nealy + U.S. GOVT:** Whether the Copyright Act includes a discovery rule is not the question before the Court. [Nealy, p. 21; US Govt., p. 15]
 - **Nealy, Author’s Guild, NSEAL:** There is no disagreement between the lower courts regarding the application of the discovery rule to the Copyright Act as nearly all courts have held the discovery rule appropriate. [Nealy, p. 21; Author’s Guild, p. 29; NSEAL, p. 8]
 - **Nealy: The Court prohibits merits briefs from raising additional issues and rarely addresses questions beyond the question presented. *Yee v. City of Escondido*.** [Nealy, p. 22]
 - **Former Register of Copyrights:** Warner misreads *Urie* – the result there was due to latent injury and not latent disease (silicosis) **Copyright often involves latent injuries that a blameless plaintiff could not reasonably discover until sometime later.** [Former Register of Copyrights Ralph Oman, p. 19]
 - Nealy was not on notice of Warner’s infringements until 2016 and the claim did not accrue until 2016. [Nealy, pg. 32]

III. STATUTORY INTERPRETATION & SUBTOPICS

WARNER CHAPPELL + AMICI:

- **“STANDARD RULE”:** “Standard rule” is that a claim accrues when there is a complete and present cause of action. *Gabelli*
- The Court has acknowledged that lower courts will apply a general discovery rule when a statute is silent but SCOTUS has refused to adopt such a broad discovery rule. (*TRW, Rotkiske*)

NEALY + AMICI:

- **There is no separate provision that limits damages** for a timely claim or that treat damages claim differently from claims seeking other forms of relief. [Nealy, p. 32 & NSEAL, p. 4]

- A cardinal principle of statutory construction is that no clause, sentence, or word shall be superfluous, void or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001).
- §507 is an umbrella provision that applies generally to Title 17.
 - § 507(a) (“[e]xcept as expressly provided otherwise ***in this title***”);
 - § 507(b) (“[n]o civil action shall be maintained ***under the provisions of this title***”).
 - It expressly governs “civil action[s]” “maintained under the provisions of this title”, *i.e.*, Title 17, and was included in the original 1976 amendments to Title 17.
- In 1998, Congress enacted a **3-year separate statute of limitations for hull designs** (§1323(c)) and **amended §504(d) (Remedies for Infringement: Damages and profits) to limit damages in certain cases.**
 - **If §507(b) contained a look-back bar then there would have been no need to include the separate statute of limitations in §1323(c)** (Recovery for Infringement (re: vessel hull designs)). [Nealy, pp. 33-35]
 - and the **1998 amendment to §504(d) (as part of Sonny Bono Copyright Term Extension Act) (fitting to discuss given we are in Palm Springs)**(which permitted additional damages in certain cases but limited to the preceding period of 3 years) would have been superfluous. [Nealy, p. 37]
 - §1323(c), on its face, is a three-year look-back damages bar that (for vessel hull design infringement claims) operates as an exception to Title 17’s general statute of limitations, §507.
- **U.S. Govt.:** §507(b) determines if a claim is timely but the elements of relief available are found in other provisions of the copyright act such as §504. §504 does not impose any time limit on damages. [US Govt., p. 19]

STATUTORY CONSTRUCTION à MEANING OF “ACCRUED” & ACCRUED vs. AROSE

The parties debate what the use of the word “accrued” signifies and what to make of use of “accrued” in the civil SOL statute (§507(b)) vs. the word “arose” in the criminal one (§507(a)).

§507(a) SOL Criminal: “... is commenced within 5 years after the cause of action “**AROSE**”

§507(b) SOL Civil: “... is commenced within 3 years after the claim “**ACCRUED**”

- **Bottom line is that WARNER CHAPPELL** side the argument is that since the Copyright Act does not define, look to ordinary meaning in legal dictionaries **which defined “accrue” as a complete and present cause of action** and the **cases reflect that meaning**. [Warner, p. 17 & 19]
- The fact that Congress used “**arose**” in **§ 507(a) (criminal)** and “**accrued**” in **§507(b) (civil)** is **not dispositive that Congress intended for different rules of accrual to apply**. [Warner, p. 30]
- Professor Tyler Ochoa (Neutral Amici) noted: T

- The inference that because Congress used “arose” in 507(a) and “accrued” in 507(b) they must have intended different meanings is weak. The Court has long treated the two terms as interchangeable. Also, “the criminal statute dates back to 1909, and it is more likely that the reenactment was used merely to renumber it, rather than to imply any difference in meaning.” [Ochoa pg. 9] The Third circuit’s (*William A. Graham Co. v. Haughey*, 568 F.3d 425 (3d Cir. 2009)) analysis that a discovery rule is the proper rule for accrual relies almost entirely on the assumption that because different words were used, they must have intended different meanings and different accrual rules. [Ochoa pg. 12]
- **NEALY + AMICI Former Register of Copyrights, Authors Guild**: When Congress uses one term in one statute and different term in another it is presumed that they are to have different meaning and supports application of Discovery Rule [Nealy, pp 39-40; Ralph Oman, p. 14; Authors Guild, pp. 5-6]

IV. LEGISLATIVE HISTORY

WARNER CHAPPELL + AMICI (LEGISLATIVE HISTORY):

- A 3-year statute of limitations was enacted to create a uniform time-period in which a claim could be brought and to create predictability and because it allowed “adequate opportunity for the injured party to commence his action.” [Warner, p. 22]
- During **hearings** prior to the adoption of the statute of limitations, **the situation of where a plaintiff does not discover the infringement until after three years was discussed and witnesses testified that the claims would be barred absent fraud.** [Warner, p. 22]

NEALY + AMICI (LEGISLATIVE HISTORY):

- Former Register of Copyrights (1985-1993): Congress has long debated adding a statute for protection of utilitarian designs. A 1957 bill was proposed to amend the copyright act to include protection for utilitarian designs. It contained a separate statute of limitations that “no recovery... shall be had for any infringement committed more than three years prior to the filing of the complaint.” The bill was struck down but had been reintroduced numerous times since 1957 with the same separate statutory language. **A version of this statutory language appears in the hull design provision enacted in the 1998 amendment as §1323(c). Had Congress thought that §507(b) contained a limit on damages they would have been no need for the separate statutory language.** [Former Register of Copyrights Ralph Oman, p.12]
- Former Register of Copyrights & Author’s Guild: When enacting the Copyright Act’s statute of limitations in 1957 (amending the 1909 Act) Congress **decided not to include proposed language that would account for fraudulent concealment because the language was “unnecessary” and the courts would recognize equitable defenses anyway.** [Former Register of Copyrights Ralph Oman, pp.22-23; Author’s Guild, p. 14]
 - Author’s Guild argument re: single statement by witness not enough absent Congressperson’s comment about or agreement with.

- In 1957 there were **few television** stations and film studios and congress enacted **broad language** that would **allow equitable principles** to continue to be applied to the **cases over time**. [Ralph Oman, p. 24]
- Prof. Ochoa (Neutral): Legislative history suggests Congress intended the wrongful act rule but that it recognized courts might apply “equitable tolling” doctrines including fraudulent concealment.

Also, PARTIES + AMICI ARGUE:

- **ON THE ONE HAND THAT CONGRESS KNEW HOW TO (HAD DONE IN OTHER STATUTES) ENACT A BROAD DISCOVERY RULE BUT CHOSE NOT TO FOR COPYRIGHT ACT,**
- **AND, CONVERSELY, KNEW HOW TO DRAFT A DAMAGES BAR BUT CHOSE NOT TO**

WARNER CHAPPELL: There were statutes already enacted at the time Congress created §507(b) that utilized a period that began upon the discovery of the injury and if Congress had intended a discovery rule they knew how to write a statute to account for one. [Warner, p. 20-21]

NEALY & AMICI: Congress knows how to draft a damages bar as seen in §1323(c) and §504(d). If Congress had intended for the discovery rule not to apply to §507(b) or for there to be a damages bar they have had opportunity to amend the statute but have failed to do so. [Nealy brief pgs. 38-39; Ralph Oman, pp. 15-16; & Author’s Guild, pp. 8-11]

V. PRACTICAL / INDUSTRY / TECHNOLOGY ARGUMENTS:

PLAINTIFF SUPPORTIVE ARGUMENTS:

- **DISCOVERY RULE PROMOTES CREATION:**
 - **NEALY + AMICI:** The public benefits from strong and long-lasting copyright protection and encourages creation. [Nealy, p. 36; Author’s Guild, p. 17]
- **EASY TO INFRINGE TODAY / ARGUMENTS RE: NEW TECHNOLOGY:**
 - **AUTHOR’S GUILD (NEALY AMICI):** The **digital boom** has created an environment where **infringement is easy and harder for copyright holders to detect** because of how **vast the internet** is. **Rampant infringement** has **affected the livelihoods** of creatives [Author’s Guild, pp. 21-23]
 - **Recording Industry Association of America (RIAA):**
 - **RIAA members enforce rights & are also subject to suits.**
 - **RIAA argues: (1) Preserve Equitable Tolling & (2) Discovery Rule can be applied only in narrowest of cases.**

- **Preserve equitable tolling:** Court should make clear that equitable tolling, which is appropriate only in extraordinary circumstances and is distinct from (+ it says, is narrower than) the discovery rule, applies to § 507(b)'s limitations period in the context of “black box” (e.g., computer system, A.I.) copyright infringement that is **undetectable as a practical matter within three years of the infringing act.**
 - **Precedent and legislative history support the conclusion that the limitations period in §507(b) is subject to equitable tolling. § 507(b) created in 1957 and Congress thought infringement would be carried out openly. While was and can still be true, technology makes copying easier and can be harder to detect.**
 - **Generative AI, data sets, copying for intra-system CLOSED non-public training.**
 - **NOT a circumstance in which the copyright owner could have brought suit within the limitations period if the owner had just tried harder and investigated more thoroughly.**

WARNER CHAPPELL / DEFENDANT'S PERSPECTIVE ARGUMENTS:

- **Warner Chappell:** Permitting relief for more than three years prior to the filing of the claim would **undermine the purpose of creating a statute of limitations**. A **broad discovery** rule would prevent companies from being able to **manage risks and create uncertainty** in which the statute of limitation was meant to prevent. [Warner, p. 23]
- **RIAA:** Warner Chappell is correct **re: broad-based discovery rule is inconsistent with §507(b)** and would **harm RIAA members (would deprive members of much needed repose; business uncertainty, never-ending threat of litigation, lost evidence, faded memories)**.
- **Association of American Publishers:**
 - **Discovery Rule with infinite look-back period** for damages is **concerning to AAP members: An open-ended statute of limitations might sometimes benefit AAP's members, but this potential advantage is overridden by the need for consistency and predictability** in copyright law, particularly **in light of the recent spate of lawsuits brought against publishers and attendant difficulties in defending what are sometimes hundreds of claims of infringing uses spanning decades.**
 - **Frequently, records, including original licenses for these uses, have been lost to time** as imprints have been acquired, **witnesses have left** and **financial information** required to contextualize profits has been **discarded, leaving publishers largely unable to defend themselves.**
 - **Publishers defending these claims have been faced with a difficult and often insurmountable burden.**
 - **Changes in their business structures, acquisitions and realignments, outdated record-keeping practices and the passage of time often means that the defendant cannot find a copy of the original license or obtain a full understanding of how the licensed photograph or other material was used.**

Indeed, at times, it has been impossible to find even a copy of the publication at issue.

- **Plaintiffs know burden and costs of discovery will often compel settlement.**
- **Defendants Rarely Will be Able to Prove that a Plaintiff Knew or Should Have Known About an Infringement Without Going Through Extensive Discovery and a Trial**
 - **Some courts look to see whether there was “smoke necessary to put” plaintiff “on inquiry notice that a fire started.”**
 - *But the reality is that, in more cases than not, courts have found that there are factual issues as to when the plaintiff discovered the infringement that require resolution at trial.*
- **Electronic Frontier Foundation (EFF), Authors Alliance, American Library Association (ALA), and Association of Research Libraries (ARL).** [EFF = nonprofit civil liberties membership organization to ensure technology supports freedom and innovation]:
 - **Copyright Trolling:**
 - The **ubiquity of copyrighted works on the internet** and the potential for **statutory damages** have **fueled a business model—copyright trolling**—that seeks **profit through monetizing threats of litigation against thousands of internet users.**
 - Allowing **unlimited look-back period encourages trolling, increases uncertainty, making speculative litigation and nuisance settlements** more likely.
 - Trolling inhibits creativity rather than promoting it.
 - **The discovery accrual rule as interpreted by the Eleventh Circuit in this case, and by the Ninth Circuit in *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022), encourages copyright trolling.**
 - Issue of **information inequality b/c of very old damages disproportionately advantage plaintiffs and encourage abuse.**
 - **Evidence such as photo logs were viewed or downloaded on a website are eventually deleted after a period of time.**
 - The ability to recover damages for infringements that occurred an arbitrarily long time ago, as long as litigation is begun within three years of discovery, expands the opportunities to seek nuisance-value settlements against numerous internet users.
 - **Fact intensive inquiry under the discovery results in sort of a shakedown:**
 - Facts are generally under the control of the plaintiff, a party accused of infringement that occurred long ago—such as a website owner or social media user who posted content online many years earlier—is often unable to determine whether the statute of limitations will apply without engaging in litigation discovery.
 - Copyright troll can leverage that discovery requirement to increase its settlement demands. The troll can demand that the accused infringer

pay a higher sum to settle dubious or poorly supported claims, to avoid the cost of discovery and the risk of far greater damages. The troll can also argue that even after discovery, the defendant won't be able to get summary judgment and will have to proceed to trial—an expensive trial that can only be avoided by paying the troll's initial demand à encourages more money demands and lawsuits based on dubious infringement claims in the first place.

- a. **Righthaven LLC** (skipping that but note it was formed to file lawsuits which it filed 250 before going out of business)
- b. **Photographs** (p. 9) **Reverse image search issue:** a general search engine query or human visitor likely will not find. (See *Bell*, 12 F.4th at 1069 & n.4, for an explanation of a reverse image search.) **These demands frequently concern images posted well over three years earlier. Such postings cause little or no monetary harm to rightsholders, no significant gain for website authors, and would not otherwise be the subject of litigation.**
- c. **Movies over torrents:** Attorneys representing small movie producers (often pornographic films) have sued more than 200,000 anonymous John Doe defendants for infringement when the Doe defendants allegedly downloaded certain films using the BitTorrent protocol. These cases all follow a similar pattern. The plaintiff files a single complaint against dozens, sometimes hundreds, of John Does at once. After obtaining permission for early discovery, the plaintiff then uses the subpoena process to seek the Does' identities from their online service providers. It then sends out form settlement demands for approximately \$2,000 (or some other number significantly less than the cost of litigation). Such lawsuits accounted for over 43% of copyright suits in 2013. See *Sag, Copyright Trolling*, 100 Iowa L. Rev. at 1117.
 - i. Criticized by courts for abusing judicial process, bad faith.

Southwestern Law School's amicus brief discussed reverse image search and other similar technology for text search etc. as tools copyright owners can use to detect infringements.