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In the Spring of 2008, Tramar Lacel Dillard and William James Adams Jr. were exceptionally confident in the success of their latest musical venture. Atop the single "In the Ayer," they proclaimed, "Oh hot damn, this is my jam. Keep me partying to the AM."[1] In doing so, however, Dillard and Adams, known professionally as artists Flo Rida and will.i.am, set in motion a legal dispute that will likely have a profound impact on the music industry, and copyright infringement litigation at large.[2] In the upcoming case *Warner Chappell Music, Inc. v. Nealy*, the Supreme Court is set to address the extent to which relief is available under the Copyright Act and the discovery accrual rule – a potential multi-million dollar determination.[3]

"In the Ayer" was one of the three singles released on Flo Rida's debut studio album, Mail on Sunday, alongside chart toppers "Low" and "Elevator."[4] The song, which was certified platinum by the Recording Industry Association of America in 2012, interpolates the 1984 song "Jam the Box" performed by Tony Butler, also known as Pretty Tony.[5] "An interpolation involves taking part of an existing musical work (as opposed to a sound recording) and incorporating it into a new work."[6] Like sampling, permission must be obtained from "both the copyright owner of the song . . . and the copyright owner of the particular recording of that song."[7] Actually obtaining these permissions, however, isn't always cut and dry.

Pretty Tony originally released "Jam the Box" under Music Specialist, Inc. (MSI), a Florida-incorporated business which he co-founded with Miami-based music producer Sherman Nealy in 1983.[8] The pair continued to release music until 1989, when Nealy was sentenced to prison for cocaine distribution.[9] During Nealy's sentence, Pretty Tony formed a second company, 321 Music, as a means to license songs from the MSI library. It was from 321 and Pretty Tony that Atlantic Records, one of the defendants, originally received the permission to sample "Jam the Box" on "In the Ayer" in 2008. Nealy claims he did not "authorize anyone to exploit the rights to the MSI catalog while he was in prison."[10] It wasn't until 2016, after Nealy had completed a second stint in prison between 2012 and 2015, that he learned that his, and MSI's, ownership rights had been violated by the non-permissive use of "Jam the Box."[11]

The issue which will soon reach the Supreme Court in *Nealy* is the limit of the discovery accrual rule, and how it interacts with the statute of limitations outlined in the Copyright Act.[12] The rule in question holds that claims remain timely when a "plaintiff files suit within three years of when the plaintiff knew or reasonably should have known that the defendant violated the plaintiff's ownership rights."[13] The timeliness under this rule governs the period of harm, in other words, set the exact time period from which a plaintiff could seek a remedy. If the harm extends back decades, the plaintiff might seek damages calculated from that initial infringement. Given Nealy's repeated prison sentences, his theory is that he could not have known or reasonably known of the violation until 2016 – upon his release from incarceration. He further contends that the period of harm stems from 2008.

The central complication stems from whether or not the Supreme Court's 2014 decision in *Petrella v. Metro-Goldwyn-Mayer* has already barred Nealy's ability to seek relief as far back from the original harm.[14] In *Petrella*, addressing a separate timeliness doctrine known as the injury rule (that each new instance of infringement resets the statute of limitations), Justice Ginsburg wrote that the structure of the Copyright Act governs a plaintiff's ability to seek a remedy. "Congress provided two controlling time prescriptions: the copyright term, which endures for decades, and may pass from one generation to another; and § 507(b)'s limitations period, which allows plaintiffs during that lengthy term to gain retrospective relief running only three years back from the date the complaint was filed."[15]

Justice Ginsburg's language ultimately created a split within the courts. The Second Circuit found that even under the discovery rule, the three-year limitation creates a hard limit on damages available, and that damages must be calculated by those incurred in the three year period prior to filing.[16] The Ninth Circuit, meanwhile, found that "[a]pplying a separate damages bar based on a three-year 'lookback period' that is 'explicitly dissociated' from the Copyright Act's statute of limitations in § 507(b) would eviscerate the discovery rule."[17] The Eleventh Circuit, which originally adjudicated the claims at bar, opted for this method. Given that the Court in Petrella expressly acknowledged the separate rules and declined to rule on damage calculations under the discovery rule, we can expect the upcoming opinion to clarify the court's position and pick a side between these two competing schools of thought.

Barring another leak from the chambers, we're left to speculate which side the court will come down on.[18] While most courts have opted for the Ninth Circuit approach – which opens up record labels to decades-worth of potential infringement liability – there are some indicators that the court will adopt the damage lockout period proscribed by the Second Circuit's reading of *Petrella*.

Firstly, four of the six justices from the *Petrella* majority (Justices Alito, Kagan, Thomas and Sotomayor) remain on the bench, and two of the justices who dissented in *Petrella* (Justices Breyer, Kennedy) have been replaced by more conservative minded jurists. While the original *Petrella* coalition might seem like odd bedfellows, the analysis the court conducted makes sense when viewed through a certain lens. That is, Justices Alito, Thomas, Scalia, avowed textualists, would opt for the strict application of the Copyright Act's statute of limitations in relation to damages, while Justices Ginsburg, Kagan and Sotomayor would see, and did see, the connective tissue between the rule in question, the injury rule, and the relief available under basic concepts of fairness.

"If the rule were, as MGM urges, 'sue soon, or forever hold your peace,' copyright owners would have to mount a federal case fast to stop seemingly innocuous infringements, lest those infringements eventually grow in magnitude. Section 507(b)'s three-year limitations period, however, coupled to the [injury] rule . . . avoids such litigation profusion. It allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle. She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered."[19]

The injury rule creates the timeliness under which the statute of limitations applies, and that throughline must hold to the relief.

Assuming, that Justices Kagan and Sotomayor would apply this same type of analysis to the discovery rule, it is likely that they would split with their *Petrella* cohorts. It is likely they would vote to apply the Ninth Circuit approach, as the discovery rule has a fundamental, separate doctrinal framework than the injury rule does. On the other hand, Justices Thomas, Alito, and Co. would opt for the Second Circuit approach, rooting the analysis firmly in the hard limit of the statute of limitations. If Chief Justice Roberts maintains his dissenting position from *Petrella* and Jackson joins her liberal leaning colleagues, Justices Alito and Thomas need the remining Justices on their side. Justice Gorsuch, through his voting record, has proven to be an unexpected wild card, and could provide the liberal wing the support they'd need to uphold the Ninth Circuit's approach.[20]

The Court must also consider the potential damage this decision will cause on an industry that is still retooling itself for the digital era.[21] Streaming services have completely upended traditional economic models, venues are battle-scarred from two years of pandemic-related restrictions, and the industry's ability to offer a seamless ticketing solution for events is facing

a crisis of Swiftian proportions.[22] The majority in *Petrella* noted concern for the rights of defendants and the burdens the accrual rules place on them. "[S]uccessful plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringement in earlier years. Profits made in those years remain the defendant's to keep."[23] The Court may be hesitant, then, to adopt an interpretation of the rule that could expose defendants to liability from thirty, or even forty years of profits if the plaintiffs can prove reasonable discovery within the last three years. The sheer magnitude might be too much for the Court to stomach, especially for an incrementalist like Chief Justice Roberts.[24]

It seems likely, if probable, given the current makeup of the Court that it will seek to adopt the Second Circuit approach and limit damages – a win for Warner and record labels across the country. That said, the dynamics are anything but static and a surprise alliance between the liberals and a maverick conservative or two isn't farfetched. But for now, the issue remains in the ayer. Ay-ay-ayer.

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1. In the Ayer, Genius (2008), https://genius.com/Flo-rida-in-the-ayer-lyrics [[https://perma.cc/DNK9-VUUL]].
2. Blake Brittain, US Supreme Court to hear Warner Music case on limits to copyright damages, Reuters (Sept. 29, 2023, 12:59 PM), https://www.reuters.com/legal/us-supreme-court-hear-warner-music-case-limits-copyright-damages-2023-09-29/ [[https://perma.cc/X6V9-6LQM]].
3. Warner Chappell Music v. Nealy, SCOTUSblog (2023), https://www.scotusblog.com/case-files/cases/warner-chappell-music-inc-v-nealy/ [[https://perma.cc/3DAW-WZZE]].
4. Mail On Sunday, Music Charts Archive, https://musicchartsarchive.com/albums/flo-rida/mail-on-sunday [[https://perma.cc/3RUW-WCLN]].
5. Gold & Platinum, Recording Industry Association of America, https://www.riaa.com/gold-platinum/?tab_active=default-award&se=flo+rida#search_section [[https://perma.cc/BN85-64AW]].
6. Sampling, Interpolations, Beat Stores and More: An Introduction for Musicians Using Preexisting Music, United States Copyright Office, https://www.copyright.gov/music-modernization/educational-materials/Sampling-Interpolations-Beat-Stores-and-More-An-Introduction-for-Musicians-Using-Preexisting.pdf [[https://perma.cc/22MQ-6YFK]].
7. Marc D. Ostrow, Music Sampling Rights: What You Need to Know, Romano Law (Oct. 14, 2022), https://www.romanolaw.com/music-sampling-rights-what-you-need-to-know/#:~:text=If%20someone%20wants%20to%20sample,label)%20to%20avoid%20copyright%20infringement [[https://perma.cc/AWZ3-WGJA]].
8. Nealy v. Warner Chappell Music, Inc., 60 F.4th 1325, 1328 (Eleventh Cir. 2023).

9. Id.
10. Id.
11. Id. at 1329.
12. 17 U.S.C. § 507(b).
13. Nealy, 60 F.4th at 1325.
14. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014).
15. Id. at 672.
16. Sohm v. Scholastic Inc., 959 F.3d 39 (Second Cir. 2020).
17. Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC, 39 F.4th 1236, 1244 (Ninth Cir. 2022).
18. Lawrence Hurley, Supreme Court says it is unable to identify the person who leaked the draft abortion ruling, NBC News, (Jan. 19, 2023, 2:23 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-says-unable-identify-person-leaked-draft-abortion-ruling-rcna66578 [[https://perma.cc/H357-WY8T]].
19. Petrella, 572 U.S. at 682-683.
20. David G. Savage, On an often unpredictable Supreme Court, Justice Gorsuch is the latest wild card, Los Angeles Times, (July 12, 2019, 4:00 AM), https://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-conservative-20190712-story.html [[https://perma.cc/Z379-J8ZQ]].
21. Larry Fitzmaurice, The Live-Music Industry is Broken, Vulture (Oct. 6, 2022) https://www.vulture.com/2022/10/the-live-music-industry-is-broken.html [[https://perma.cc/23B6-3M67]].
22. Adam Beam, After outrage over Taylor Swift tickets, reform has been slow across the US, AP News (Sept. 1, 2023, 3:39 PM) https://apnews.com/article/american-concert-ticket-sale-reforms-taylor-swift-a5ddb8282a2c72f6dedafc8139c75921 [[https://perma.cc/63CH-J7VH]].
23. Petrella, 572 U.S. at 677.
24. Adam Liptak, Roberts's Incremental Approach Frustrates Supreme Court Allies, New York Times, (July 14, 2014), https://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html [[https://perma.cc/E2N5-VKPH]].