

No. 12-1315

IN THE
Supreme Court of the United States

PAULA PETRELLA,

Petitioner,

v.

METRO-GOLDWYN-MAYER INC., ET AL.,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion in dismissing petitioner's entire claim for copyright infringement pursuant to the equitable defense of laches.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT**

MGM Holdings Inc. is the ultimate parent company of: Metro-Goldwyn-Mayer Inc.; Metro-Goldwyn-Mayer Studios Inc.; Metro-Goldwyn-Mayer Home Entertainment LLC; Metro-Goldwyn-Mayer Home Entertainment Distribution Corp.; and United Artists Corp.

Twentieth Century Fox Home Entertainment LLC is a wholly owned subsidiary of Twenty-First Century Fox, Inc., a publicly traded corporation organized under the laws of Delaware. No publicly traded corporation other than Twenty-First Century Fox, Inc. owns 10% or more of the stock of Twentieth Century Fox Home Entertainment LLC.

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STATEMENT

Petitioner alleges that the 1980 film *Raging Bull* infringes a 1963 screenplay to which she obtained the rights in 1991. Although petitioner's copyright infringement claim initially accrued in 1991, she did not bring suit until 2009—18 years later—because she wanted to see if the film would become profitable. The district court made factual findings that petitioner's delay was unreasonable and caused respondents both expectancy and evidentiary prejudice, and granted summary judgment on respondents' affirmative defense of laches. The court of appeals affirmed.

1. Former boxing champion Jake LaMotta collaborated with petitioner's father Frank Petrella to create a book and two screenplays about LaMotta's life and career. Pet. App. 3a, 30a; J.A. 164, 193, 200–01, 207.

LaMotta and Petrella registered a copyright for the book, *Raging Bull: My Story*, in July 1970 when it was published. J.A. 199–206. The copyright registration listed three co-authors: Petrella (under a pseudonym), LaMotta, and Joseph Carter. *Ibid.* The copyright registration did not say when the work was written, nor did it list any preexisting work on which it was based. *Ibid.* Petrella also wrote a screenplay about LaMotta's life and career that he registered in 1963. J.A. 194–98. Although the copyright registration listed Petrella as the sole author (J.A. 196), the title page makes clear that it was written “in collaboration with” LaMotta (J.A. 164). A second screenplay was registered in 1973, listing Petrella as the sole author. J.A. 206–09.

In 1976, Petrella and LaMotta individually assigned to respondent MGM's predecessors-in-interest

“exclusively and forever, including all periods of copyright and renewals and extensions thereof,” their respective motion picture rights in the book and both screenplays. J.A. 48–49. LaMotta also assigned the motion picture rights to his life story. J.A. 50–51. Petrella and LaMotta made clear in the 1976 agreement that the book was written before the two screenplays by specifically representing that they and Carter were “the sole authors of the [book]” and that the book “is original and has not been copied or adapted from any literary, dramatic or other work.” J.A. 67. As to the two screenplays, Petrella and LaMotta represented that they had “not been copied or adapted from any literary, dramatic or other work other than [the book].” *Ibid.* (emphasis added).

Raging Bull was released four years later in 1980. J.A. 25.

2. Petrella died in 1981. In 1990, petitioner “engaged an attorney to advise and assist her regarding her [copyright] renewal rights.” Pet. App. 4a. Under *Stewart v. Abend*, 495 U.S. 207 (1990), when an author dies before a copyright renewal period for a work begins, the renewal rights revert to the author’s statutory heirs, free and clear of any prior grant of rights. *See id.* at 221.

In 1991, petitioner filed a renewal application for the 1963 screenplay. Pet. App. 4a–5a; J.A. 112. She did not, however, file timely renewal applications for the book or 1973 screenplay and has conceded that her claim is based solely on any protectable expression contained in the 1963 screenplay. *See* Pet. App. 32a, 34a.

Petitioner acknowledges that she was aware of all elements of her copyright infringement claim as of 1991, based on MGM’s continued distribution of

Raging Bull. Pet. App. 42a; J.A. 109–12. Further, because *Raging Bull* was a critically acclaimed, Academy Award winning film, it was foreseeable that MGM would continue to distribute it. Nevertheless, petitioner instituted no legal action because, she admitted, “the film was deeply in debt and in the red and would probably never recoup.” J.A. 110.

In 1998, petitioner first asserted in a letter to MGM that MGM’s continued exploitation of *Raging Bull* was an infringement of her rights. Pet. App. 5a, 32a; J.A. 125–27. Petitioner and respondents exchanged a few letters over the next two years, in which petitioner accused respondents “of infringing her copyrights and [respondents] insisted they were not.” Pet. App. 5a. Petitioner “repeatedly threatened to take legal action,” but she did not do so. *Ibid.* “The final letter in this series was dated April 5, 2000.” Pet. App. 5a–6a; *see* J.A. 266. Following MGM’s refutation of her demand, petitioner took no further action. In fact, in 2005, petitioner was a guest at MGM’s 25th anniversary gala for *Raging Bull*. J.A. 294.

3. Petitioner initiated this lawsuit in 2009. Pet. App. 6a; J.A. 19–36. She asserted causes of action for copyright infringement, unjust enrichment, and an accounting. J.A. 29–33. Her infringement claim was based on the allegation that *Raging Bull* “is based on and a derivative work of the 1963 Screenplay, 1973 Screenplay, and the Book.” J.A. 29. On this claim, petitioner’s prayer for relief sought “damages derived by [respondents] from their copyright infringement,” cancellation or transfer of any copyright in the film, and an injunction. J.A. 34.

Following discovery, respondents moved for summary judgment on three substantive grounds:

First, that there is no substantial similarity between *Raging Bull* and any protectable elements of the 1963 screenplay (see, e.g., *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978–80 (2d Cir. 1980)); second, that LaMotta’s grant of motion picture rights in the book remains valid and sufficient notwithstanding the reversion of Petrella’s interest (see, e.g., *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007)); and third, because petitioner failed to renew the copyright in the book and 1973 screenplay, respondents may exploit any existing derivative works, including the film (17 U.S.C. § 304(a)(4)(A)). D.C. Dkt. 54, at 5–14.

Respondents also asserted the defense of laches, seeking dismissal of the entire action because petitioner’s 18-year delay in filing suit was unreasonable and had caused substantial evidentiary and expectations-based prejudice to respondents. D.C. Dkt. 54, at 20–24. Petitioner argued in response only that her conduct did not amount to laches; she did not dispute that laches is an available defense to a claim of copyright infringement or that laches, if proved, would bar her entire action. See D.C. Dkt. 63, at 17–21.

4. The district court determined that respondents’ substantive objections “do not have to be definitively answered” (Pet. App. 36a) because laches barred petitioner’s claims in their entirety. See Pet. App. 46a. As the court recognized, respondents bore the burden of “‘establish[ing] (1) lack of diligence by the plaintiff, and (2) prejudice to the defendant.’” Pet. App. 42a (citation omitted).

As to the first element, “the relevant delay is the period from when the plaintiff knew (or should have known) of the allegedly infringing conduct, until the

initiation of the lawsuit in which the defendant seeks to counterpose the laches defense.” Pet. App. 42a (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001)). In this respect, “[i]t is essentially undisputed that [petitioner] had knowledge of the legal theories she is asserting in this action in 1990 or 1991.” *Ibid.* Given that she did not file suit until 2009, the delay “element of [respondents’] laches defense is easily satisfied.” Pet. App. 43a. “Here, the *only* justification offered for the delay is that [petitioner] waited to bring suit to assess [*Raging Bull*’s] profitability.” Pet. App. 44a (emphasis added). The court found that petitioner’s 18-year “delay in bringing suit was unreasonable.” *Ibid.*

The district court also found that respondents “have shown prejudice resulting from the delay.” Pet. App. 44a.

First, the court found expectations-based prejudice “because [respondents] have made significant investments in exploiting the film,” the benefit of which petitioner “would potentially be allowed to reap.” Pet. App. 44a–45a. Respondents have distributed *Raging Bull* since 1991 “on a continuous basis in the United States and abroad,” and “expended substantial financial and other resources as a part of this effort,” including “costs related to marketing, advertising, distributing and otherwise promoting the Film in various media.” J.A. 39. The expenses attributable to domestic marketing alone totaled almost \$8.5 million during the 18 years before petitioner brought suit. J.A. 40. Respondents also entered into multiple licensing agreements with third parties concerning broadcast rights for the movie. J.A. 41.

Second, the court found that respondents “have also shown evidentiary prejudice resulting from the long delay.” Pet. App. 45a. Respondents’ defenses to petitioner’s copyright infringement claim turned on several disputed matters of historical fact. As just one example, after respondents pointed out that the authors’ contractual representations in the 1976 agreement established that both screenplays were derivative of the jointly authored book, petitioner asserted, for the first time, that Petrella and LaMotta were “incorrect” when they made these contractual representations. J.A. 295. Petitioner’s entire claim depends on this factual issue, yet during her delay both Petrella’s wife and LaMotta’s second wife died, while LaMotta, who “suffered myriad blows to his head as a fighter years ago,” had become elderly and “no longer recognizes [petitioner], even though he has known her for forty years.” Pet. App. 45a–46a; *see also* J.A. 26–27, 122, 231.

Based on its discretionary determination that “[t]here are strong equitable arguments against allowing *this action* to proceed,” the district court granted summary judgment. Pet. App. 46a (emphasis added).

5. The court of appeals unanimously affirmed. Pet. App. 7a–18a, 23a. In her appellate brief, petitioner conceded that “the equitable defense of laches could apply to a copyright infringement claim,” while elsewhere arguing that laches categorically did not apply to her common-law claims. Pet. C.A. Br. 38, 55.

The Ninth Circuit reiterated that “it is ‘[u]ndisputed [petitioner] was aware of her potential claims (as was MGM) since 1991,’ when her attorney filed her renewal application for the 1963 screenplay.

She did not file her lawsuit until 18 years later, in January 2009.” Pet. App. 9a (first alteration in original). The court concluded that petitioner’s proffered justifications “are insufficient to demonstrate that the filing delay was reasonable.” Pet. App. 10a. “More importantly, the evidence suggests the true cause of [petitioner’s] delay was, as she admits, that ‘the film hadn’t made money’ during this time period.” Pet. App. 11a. As a result, the “district court did not err in finding [petitioner’s] delays in notification and in filing suit—[18] years, combined—were unreasonable.” *Ibid.*

The Ninth Circuit next determined that respondents had suffered expectations-based prejudice based on the “nearly \$8.5 million” they had spent on U.S.-based marketing of *Raging Bull* and the licensing agreements they had made for broadcast and future distribution rights. Pet. App. 12a–14a, 17a–18a. The court did not address or disturb the district court’s finding of evidentiary prejudice caused by petitioner’s unreasonable delay. Pet. App. 12a.

SUMMARY OF ARGUMENT

I. The equitable defense of laches applies where a plaintiff’s unreasonable delay prejudices the defendant. *Costello v. United States*, 365 U.S. 265, 282 (1961). The Court has recognized that laches applies in cases brought under a variety of federal statutes, including the Copyright Act. *Callaghan v. Myers*, 128 U.S. 617, 658–59 (1888). Contrary to petitioner’s submission, Congress did not abrogate this venerable doctrine merely by enacting a three-year statute of limitations for civil copyright claims in 1957. 17 U.S.C. § 507(b).

A. The separation of powers does not preclude courts from applying laches (or any other equitable

doctrine) to claims governed by a statute of limitations. On the contrary, laches functions as a necessary counterbalance to rolling limitations periods that can be extended indefinitely. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–22 (2002).

1. A statute of limitations and the defense of laches serve different functions. The former, an across-the-board rule, measures *only* the passage of time; the latter, a discretionary doctrine focusing on the circumstances of each case, requires *both* unreasonable delay *and* prejudice.

2. For nearly two centuries, this Court has recognized that laches can bar claims governed by, and brought within, a statute of limitations. *E.g.*, *Patterson v. Hewitt*, 195 U.S. 309, 318–19 (1904); *McKnight v. Taylor*, 42 U.S. (1 How.) 161, 168 (1843). Petitioner's attempt to upend this settled understanding rests on a misreading of snippets from three decisions of this Court.

3. Petitioner's constitutional theory would preclude the laches defense not just for copyright claims, but in any case governed by statutory time limits. Accepting it would thus oust an important equitable defense from nearly every federal civil case.

B. The Copyright Act does not preclude courts from applying laches (or any other equitable doctrine) to claims brought under it. On the contrary, the 1957 Congress intended that courts would retain their equitable powers in adjudicating copyright claims.

1. Congress legislates in light of background common-law principles, including traditional equitable doctrines such as laches. This Court does not construe statutes to abrogate such principles absent a clear congressional command.

2. Congress, of course, can eliminate laches (and other equitable doctrines) through an express statement or by enacting a statute of repose. The 1957 amendment to the Copyright Act did neither. The government agrees. U.S. Br. 24–26.

3. Nothing in the Patent Act expressly authorizes laches, yet this Court and others have long applied the defense to patent infringement claims even though that statute has contained a limitations period since 1897. There is no principled basis for eliminating laches in copyright but not patent cases.

4. The legislative history confirms that the 1957 amendment to the Copyright Act preserved the equitable powers of the federal courts. Again, the government agrees. U.S. Br. 24–26.

5. Petitioner’s insistence that copyright infringement claims are subject to a rolling statute of limitations confirms the availability of laches. Given lengthy copyright terms and the repeated exploitation of the same work, a copyright plaintiff can delay bringing suit almost indefinitely unless constrained by equity. In analogous scenarios, the Court has recognized the importance of the laches doctrine. *Morgan*, 536 U.S. at 121–22.

II. The district court did not abuse its discretion in applying the laches doctrine here.

A. The district court had authority to bar petitioner’s entire copyright infringement claim, including her requests for monetary and injunctive relief.

1. Courts have always possessed the equitable discretion to determine, based on the specific evidence of prejudicial delay in each case, whether laches bars an entire claim or simply discrete remedies. This discretion is consistent with the flexible, case-

specific nature of equity. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006).

2. Evidentiary prejudice compromises a defendant’s ability to defend against *liability*. Copyright actions generally, and the facts of this case specifically, illustrate the need for courts to retain their longstanding discretion to find that laches bars an entire action, and not merely certain remedies, to prevent such prejudice.

3. Law and equity were merged in 1938. Petitioner’s suit is thus a civil action, not an action at law or in equity. Fed. R. Civ. P. 2. All civil actions today are subject to various equitable doctrines, including the affirmative defense of laches. Fed. R. Civ. P. 8(c)(1). Since the merger, this Court has never precluded the application of laches to claims that include a prayer for legal relief, and other equitable doctrines apply in such cases.

4. This Court has also recognized that laches can bar requests for the equitable remedies of disgorgement and injunction.

B. The district court made factual *findings* that were not disturbed on appeal and are not challenged by petitioner in this Court. There was no abuse of discretion in precluding petitioner’s entire claim based on those findings.

1. Petitioner’s 18-year delay before filing suit was unreasonable and respondents were prejudiced by this delay. Respondents made substantial investments into promoting and distributing *Raging Bull* since 1991—in justifiable reliance on their rights. Moreover, all the remaining key witnesses died or became unavailable during petitioner’s long delay, and respondents were prejudiced by this loss of evidence.

2. Neither of the lower courts applied a “presumption” that laches bars petitioner’s claim.

The judgments below should be affirmed.

ARGUMENT

Petitioner waited almost two decades after her copyright infringement claim initially accrued before filing suit because, as she admitted, she wanted to see if *Raging Bull* would become profitable. During that time, respondents spent millions of dollars promoting and distributing the film, while the remaining key witnesses passed away or became unable to testify. Recognizing this as a textbook case for laches, the district court granted summary judgment to respondents on that basis, and the court of appeals affirmed.

The lynchpin of petitioner’s bid for reversal is her contention that applying laches to copyright infringement claims would violate the separation of powers or the Copyright Act. As shown in Part I, this argument is irreconcilable with the Constitution, the statute, and two centuries of precedent—as the government acknowledges. U.S. Br. 20–27. Part II establishes that additional objections raised by petitioner are both forfeited and meritless. Therefore, the judgments below should be affirmed.

I. FEDERAL COURTS MAY PROPERLY APPLY THE LACHES DEFENSE IN COPYRIGHT CASES

The defense of laches, which predates our Constitution, properly applies where the claimant has waited unreasonably long to assert her claim and the defendant suffers prejudice from the delay. *Costello v. United States*, 365 U.S. 265, 282 (1961); *Russell v. Todd*, 309 U.S. 280, 287 (1940). It reflects the ancient maxim that equity aids the vigilant and not

those who sleep on their rights (*vigilantibus non dormientibus æquitas subvenit*). See *City of New York v. Pine*, 185 U.S. 93, 98 (1902). The federal courts inherited the defense of laches and other established equitable doctrines from English chancery practice. See, e.g., *Piatt v. Vattier*, 34 U.S. (9 Pet.) 405, 416–17 (1835).

Before the 1938 merger of law and equity, this Court applied the laches defense to a variety of claims, including claims arising under federal statutes. See, e.g., *Lane & Bodley Co. v. Locke*, 150 U.S. 193, 200–01 (1893) (Patent Act); *Sparhawk v. Yerkes*, 142 U.S. 1, 15–16 (1891) (Bankruptcy Act); *McLean v. Fleming*, 96 U.S. 245, 257–58 (1877) (1870 Trademark Act). The Court also applied laches to claims brought within the applicable statute of limitations. See, e.g., *Nicholas v. United States*, 257 U.S. 71, 76–77 (1921); *Patterson v. Hewitt*, 195 U.S. 309, 318–19 (1904).

This Court has specifically recognized the availability of laches in a case brought to enforce the Copyright Act. *Callaghan v. Myers*, 128 U.S. 617, 658–59 (1888). Federal courts recognized that laches “is peculiarly applicable to motions for injunction in cases of patent and copyright, and has been uniformly applied to them.” *Cooper v. Mattheys*, 6 F. Cas. 482, 485 (C.C.E.D. Pa. 1842) (No. 3,200); see also *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136); U.S. Br. 23.

As Judge Learned Hand explained, these cases reflect that it would be “inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a

success.” *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916); *see also D.O. Haynes & Co. v. Druggists’ Circular*, 32 F.2d 215, 216, 218 (2d Cir. 1929); U.S. Br. 24 n.4.

The advent of the Federal Rules in 1938 brought about the merger of law and equity in the federal system. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988). Whereas pre-merger cases were brought “at law” or “in equity,” with different substantive and procedural rules governing each form of action, after the merger “[t]here is one form of action—the civil action.” Fed. R. Civ. P. 2.

Following the merger, this Court continued to acknowledge the availability of laches in civil actions brought to enforce federal claims. *See, e.g., Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956). And federal courts continued to apply laches to copyright infringement claims. *See, e.g., Edwin L. Wiegand Co. v. Harold E. Trent Co.*, 122 F.2d 920, 925 (3d Cir. 1941). Courts expressly held that laches could completely bar copyright infringement actions seeking both legal and equitable relief. *See Egner v. E.C. Schirmer Music Co.*, 48 F. Supp. 187, 187, 190 (D. Mass. 1942) (injunction and statutory damages), *aff’d*, 139 F.2d 398 (1st Cir. 1943).

In 1957, with this historical backdrop, Congress enacted a statute of limitations for “civil action[s]” brought to enforce the Copyright Act. 17 U.S.C. § 507(b). Since then, the courts of appeals have continued to apply laches to copyright cases. *See, e.g., Chirco v. Crosswinds Cmty., Inc.*, 474 F.3d 227, 235–36 (6th Cir. 2007); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 963 (9th Cir. 2001); *New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 584–85 (2d Cir. 1989). As a leading treatise notes, “laches

has an illustrious pedigree across the circuits as a defense to a charge of copyright infringement.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.06(A) (Lexis 2013).

Courts have construed the Copyright Act’s statute of limitations to permit suit within three years after the most recent act of infringement. *See* U.S. Br. 11–14. Coupled with the “uniquely long periods of protection” for copyright holders (*id.* at 14), this “rolling” statute of limitations (Nimmer, *supra*, § 12.05(B)) means that an infringement suit can be brought many years after it initially accrues. As explained further in Part I.B.5. below, a critical counterweight to the indefiniteness created by this regime is the laches doctrine, which allows courts to terminate an action where the claimant waited unreasonably long to the prejudice of the defendant. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–22 (2002) (applying the same reasoning to certain Title VII claims).

Petitioner nonetheless advances the sweeping contention that laches is *never* an available defense in copyright infringement actions simply because Congress adopted a statute of limitations for civil actions to enforce the Copyright Act. Pet. Br. 18. Only one circuit has ever accepted this position. *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001). That decision, like petitioner, is wrong.

A. Federal Courts Have The Inherent Equitable Power To Apply Laches In All Civil Actions

Petitioner advances the startling constitutional theory that “[t]he separation of powers bars judges from superimposing additional timeliness require-

ments upon those prescribed by Congress.” Pet. Br. 24. But federal courts have exercised their inherent equitable powers since the Judiciary Act of 1789, and this Court has never suggested that discretionary adjustments to timely filing periods—including equitable tolling, the discovery rule, estoppel, and laches—violate the Constitution. This country inherited the English system of law and equity, not the Napoleonic Code. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). Petitioner’s theory would make laches (and other equitable doctrines) unavailable *whenever* a federal statutory claim is governed by a limitations period. This Court has consistently held otherwise.

1. Petitioner’s separation-of-powers theory starts from the faulty assumption that laches is a mere “timeliness doctrine,” and that “[t]he laches defense is redundant of a statute of limitations.” Pet. Br. 28–29. In fact, laches and limitations periods are different from one another and are complementary rather than conflicting or overlapping defenses.

Because statutes of limitations are designed to protect “the repose of society” (*Pub. Schs. v. Walker*, 76 U.S. (9 Wall.) 282, 288 (1869)), they operate through “by definition arbitrary” rules that consider *only* the passage of time. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

The “essence of laches,” by contrast, “is not merely lapse of time.” *S. Pac. Co. v. Bogert*, 250 U.S. 483, 488 (1919). As this Court put it, “laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.” *Holmberg v. Armbrecht*, 327 U.S. 392, 396

(1946) (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)) (internal quotation marks omitted). Because it is designed to prevent “prejudice to the defendant” and to preserve “[t]he equities of the parties,” laches has always been “a question primarily addressed to the discretion of the trial court.” *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 30–31 (1951) (per curiam).

Given their different goals and operations, the existence of a statute of limitations does not determine whether laches can apply, or *vice versa*. Cf. *Holmberg*, 327 U.S. at 396 (“Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief”). The defense of “estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations.” *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 509 (1913). Accordingly, for purposes of the defense of laches, “[e]very case is governed chiefly by its own circumstances,” and “[w]hether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court.” *Brown v. Cnty. of Buena Vista*, 95 U.S. 157, 160 (1877).

Importantly, “*mere delay* to commence a suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding.” 2 John Norton Pomeroy, *A Treatise on Equity as Administered in the United States of America* § 419, at 175 n.15 (5th ed. 1941) (emphasis added). The defense of laches always requires two additional elements: an *unreasonable* delay that *prejudices* the defendant. See *Morgan*, 536 U.S. at 121 (“a laches defense ... bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant”). Petitioner’s repeated

suggestion that laches “can be triggered by ‘delay alone’” (Pet. Br. 29 (citation omitted); *see also id.* at 18, 24, 33, 38, 63) is incorrect. *See* U.S. Br. 21–22.

The laches defense has been available to copyright defendants since the 19th century, yet it has not spawned a welter of litigation. Accordingly, any concern that maintaining the status quo will incentivize copyright holders “to flood the courts with premature infringement claims” (Oman Br. 26 (capitalization altered); *see* Pet. Br. 56–58; AIPLA Br. 10–11) is baseless. Changing the rules, however, could encourage prospective defendants to engage in preemptive litigation: Film studios such as respondents receive numerous allegations of infringement each year, even though the vast majority of them never lead to litigation. If laches were abolished, the studios might have to consider initiating declaratory or other actions to secure their continued right to exploit, market, and transfer their intellectual property assets. Accordingly, if petitioner is truly concerned about “breeding excessive, costly litigation” (Pet. Br. 56), jettisoning a longstanding and accepted equitable defense is not a good place to start.

2.a. Because the two doctrines are different, this Court has long recognized that laches can apply to claims governed by a statute of limitations, and, “when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations.” *Alsop v. Riker*, 155 U.S. 448, 461 (1894); *accord, e.g., McKnight v. Taylor*, 42 U.S. (1 How.) 161, 168 (1843) (“courts of equity refuse to interfere after a considerable lapse of time” even when the claim is “not barred by the act of limitations”). As the government observes, this Court has consistently “acknowledge[d] the potential availability of a laches defense to equitable claims

filed within a statute of limitations.” U.S. Br. 22–23; see 2 Pomeroy, *supra*, § 419c, at 177 (“the court may refuse its aid although the period which has elapsed without suit is less than that which is prescribed by statute”).

In *Patterson*, for example, the Court explained—in the context of jurisdictions “where there is but one form of action applicable both to proceedings of a legal and equitable nature”—that the “defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired.” 195 U.S. at 318–19. It did so because awarding relief in that case “would be grossly unjust to the defendants,” who had invested considerable resources in developing real property while the plaintiffs delayed bringing a claim. *Id.* at 320. Similarly, this Court has applied laches to bar compensation claims by former federal employees that were brought within the relevant federal six-year statutory limitations period. *Norris v. United States*, 257 U.S. 77, 80–82 (1921); *Nicholas*, 257 U.S. at 76–77; see Act of Mar. 3, 1863, § 10, 12 Stat. 765, 767.

In more recent times, this Court has reiterated that laches can apply to a number of statutory claims that are governed by congressionally enacted limitations periods. See *Morgan*, 536 U.S. at 121 (“an employer may raise a laches defense” against Title VII claims); *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) (the “defense of laches could be asserted if the Government is prejudiced by a delay” in bringing an action for injunctive relief under the Administrative Procedure Act); see also *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007). And it has made clear that this defense is critical where, as here, a plaintiff can extend the statutory limitations period indefinitely. See *Morgan*, 536 U.S. at 121

(laches can apply when, “despite the procedural protections of the statute,” a defendant is “significantly handicapped in making his defense because of an inordinate ... delay” resulting from “claims that extend over long periods of time”) (citation omitted).

b. Despite this Court’s longstanding recognition that laches can bar claims brought within the statutory limitations period, petitioner baldly asserts—as a matter of *constitutional* law—that “[w]here Congress has enacted a statute of limitations, courts may not use laches to constrict that time period.” Pet. Br. 28. Accepting that assertion would require overruling many of this Court’s laches precedents. Indeed, this Court has decided literally hundreds of cases involving the laches doctrine; yet petitioner’s entire submission rests on just three of them, from each of which petitioner plucks out of context a single passage. *See id.* at 28–29.

Petitioner first points to the statement in *Holmberg* that “[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.” Pet. Br. 28 (quoting 327 U.S. at 395). That observation, however, was not a rejection of the application of laches (or any other equitable defense) within the limitations period. Instead, it was a lead-in to the unremarkable proposition that in the absence of a congressionally created time limit, “it is federal policy to adopt the local law of limitation.” 327 U.S. at 395. If this statement meant what petitioner says it does, *Holmberg* would not have held that the “equitable doctrine” of the discovery rule is “read into every federal statute of limitation,” or that a “suit in equity may fail though ‘not barred by the act of limitations.’” *Id.* at 396–97 (citation omitted). In fact, the

Court remanded the case to determine “whether the petitioners are chargeable with laches.” *Id.* at 397.

The second of petitioner’s authorities simply confirms that “[l]aches may bar equitable remedy before the local statute [of limitations] has run.” *Russell*, 309 U.S. at 288 n.1. The Court did not say that laches “applies only ‘in the absence of any [applicable] statute of limitations’” (Pet. Br. 28 (citation omitted)); it said that “equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant.” 309 U.S. at 287. Likewise, the Court did not say that laches is concerned with “delay alone” (Pet. Br. 29); it said that “[i]n the application of the doctrine of laches [equity] recognized that prejudice may arise from delay alone, so prolonged that in the normal course of events evidence is lost or obscured.” 309 U.S. at 287. Shorn of petitioner’s selective editing, *Russell* provides no support for her constitutional contention.

Petitioner’s final toehold is this Court’s pre-merger statement that “[l]aches within the term of the statute of limitations is no defense at law.” *United States v. Mack*, 295 U.S. 480, 489 (1935); see Pet. Br. 28. But that lone sentence cannot support her theory: As explained in Part II.A.3. below, petitioner’s suit is not an action “at law,” but a post-merger “civil action” that is subject to equitable defenses, including laches. Fed. R. Civ. P. 2, 8(c)(1). Moreover, her complaint requests *only* equitable relief.

3. Petitioner’s constitutional argument also rests on the flawed assumption that applying laches to copyright claims would “overrule the legislature’s

judgment as to the appropriate time limit to apply for actions brought under the statute.” *Lyons*, 243 F.3d at 798; *see* Pet. Br. 29. But there is no reason to infer that Congress invariably intends a statutory limitations period to set both a ceiling and a floor. *See* Vikas K. Didwania, Comment, *The Defense of Laches in Copyright Infringement Claims*, 75 U. Chi. L. Rev. 1227, 1245 (2008).

Petitioner attempts to turn a shield for defendants into a sword for plaintiffs, arguing that any claim brought within the statute of limitations must necessarily proceed. But statutes of limitations cut off the enforcement of rights rather than create them (*Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 389–90 (1868)), and there are many reasons why a claim brought within the statute of limitations may be invalid or barred. Those reasons are known as affirmative defenses; they are collected in Rule 8, and laches is one of them.

Indeed, petitioner’s separation-of-powers theory would preclude the operation of laches to *any* federal cause of action that is subject to a statutory limitations period. Because courts “do not ordinarily assume that Congress intended that there be no time limit on actions at all” (*Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 146 (1987) (citation omitted)), a federal cause of action is generally governed by a specific statute of limitations, the default four-year limitations period under 28 U.S.C. § 1658(a) (if created after 1990), or a time limit borrowed from state law or some other legislative source. As the Chamber of Commerce explains, petitioner’s theory is in no way limited to copyright (or even intellectual property) claims, but would eviscerate a traditional affirmative defense to nearly

every federal cause of action—including claims under the antitrust, securities, and employment laws.

Defendants facing such statutory claims would thereby be deprived of an important defense in extreme cases of prejudicial delay (such as where a claimant waits until a key witness dies or until defendants' efforts make the property profitable), which would serve only to encourage opportunistic litigants in a variety of contexts. See Feldman Br. 7–26. In fact, such dubious litigation tactics are the avowed purpose of some of petitioner's *amici*. See Authors Guild Br. 13–14; Oman Br. 27. Equity does not tolerate this kind of gamesmanship.

“[C]ourts of equity go farther in the promotion of justice” than legislative time limits do, “and where laches exist, deny the relief sought, even though the statutory period may not have run under the applicable statute.” *O'Brien v. Wheelock*, 184 U.S. 450, 493 (1902); see also U.S. Br. 22. The Judiciary's time-honored exercise of this inherent equitable power crosses no constitutional line.

B. Congress Intended That Federal Courts Would Apply Laches In Copyright Cases

Petitioner *conceded* in the court below that “the equitable defense of laches could apply to a copyright infringement claim.” Pet. C.A. Br. 38. And for good reason: As petitioner acknowledges, a variety of equitable doctrines served as “background principle[s] against which Congress legislated” when it inserted a statute of limitations into the Copyright Act. Pet. Br. 17; see *id.* at 32, 63. Petitioner's newly minted contention that “laches is not [such] a background principle” (*id.* at 15) is wrong.

1.a. “Congress is understood to legislate against a background of common-law adjudicatory principles,” and “where a common-law principle is well established, ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted). This Court does “not lightly assume that Congress meant to restrict the equitable powers of the federal courts” (*Miller v. French*, 530 U.S. 327, 335 (2000)), for the same reason that “statutes in derogation of the common law are to be strictly construed.” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (citation omitted).

Because “Congress must be presumed to draft limitations periods in light of” well-established equitable doctrines (*Young v. United States*, 535 U.S. 43, 49–50 (2002)), this Court has repeatedly recognized that the application of equitable principles to cases also governed by statutory time bars is consistent with legislative intent. For example, “[i]t is hornbook law that limitations periods are ‘customarily subject to “equitable tolling”’”; thus, that equitable principle is fully consonant with congressional intent in establishing a statute of limitations. *Ibid.* (citation omitted). Similarly, the “equitable doctrine” of the discovery rule—*i.e.*, “where a plaintiff has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered’”—“is read into every federal statute of limitation.” *Holmberg*, 327 U.S. at 397 (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)).

Congress, of course, has the power to “shape the contours” of federal causes of action, whether it acts under the Progress Clause or any other constitutional provision. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007). Congress therefore may depart from the equitable backdrop against which it legislates (*see, e.g., United States v. Brockamp*, 519 U.S. 347, 353–54 (1997)), but only if it does so clearly. Because this Court does not “assume that Congress has disregarded well settled principles of equity” (*SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 457 (1940)), it will “not construe a statute to displace courts’ traditional equitable authority absent the *clearest command*.” *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (emphasis added) (citation omitted).

b. This Court will not interpret a statute of limitations to override equitable doctrines in the absence of a textual instruction to do so. *See, e.g., Young*, 535 U.S. at 49 (tolling); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233–34 (1959) (estoppel). The Copyright Act’s statute of limitations cannot be read to preclude the ancient defense of laches merely because the Act includes no express “wording inviting recourse to laches.” Pet. Br. 31. “The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.” *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836).

As petitioner concedes, the principles of equity—including “the defense of estoppel,” “the defense of unclean hands,” “the defense of abandonment,” and “equitable tolling”—are “well-established background principle[s]” against which “Congress legislated when it enacted the statute of limitations for copyright infringement claims.” Pet. Br. 32–33, 62–63 &

n.17. These doctrines are “read into every federal statute of limitation” (*Holmberg*, 327 U.S. at 397), and thus are available in copyright cases even though *none* is mentioned in the statute. Petitioner’s request that this Court distinguish between laches and all other equitable doctrines (Pet. Br. 33) has no support in equity, jurisprudence, or logic.

For example, petitioner maintains that “unlike laches, estoppel is a background principle against which Congress legislated.” Pet. Br. 17. But laches is a *species* of estoppel; this Court has long referred to the laches doctrine as “estoppel by laches” (*see, e.g., Boyd*, 228 U.S. at 509), and courts have treated the defenses as largely the same. Laycock Br. 20–23; *see, e.g., Teamsters & Emp’rs Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 882 (7th Cir. 2002) (“Laches is thus a form of equitable estoppel rather than a thing apart”); D.C. Dkt. 29, at 7.

Moreover, if the mere enactment of a statute of limitations precludes the laches defense, as petitioner contends, it would also have to preclude equitable tolling and similar adjustments to the limitations period. Her suggestion that “equity may expand relief but may not contract it” (Cert. Reply Br. 11; *accord* Authors Guild Br. 9 n.3), is nonsense: This Court’s precedents confirm that judicial adjustments to a limitations period run in both directions. *See Morgan*, 536 U.S. at 122 (noting that courts can “apply[] equitable doctrines that may *toll or limit* the time period” set by statute) (emphasis added). “What is sauce for the goose (the plaintiff seeking to extend the statute of limitations) is sauce for the gander (the defendant seeking to contract it).” *Teamsters*, 283 F.3d at 882.

Petitioner is thus forced to contend that “[w]hile tolling is an established background principle ..., laches is not.” Pet. Br. 15. This is more nonsense. *See, e.g., Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005) (“Equity always refuses to interfere where there has been gross laches in the prosecution of rights”) (quoting *McQuiddy v. Ware*, 87 U.S. (20 Wall.) 14, 19 (1874)); *see also Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (“We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights”); *Bailey*, 88 U.S. (21 Wall.) at 349 (the discovery rule applies only “when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud”); Laycock Br. 13.

Laches and estoppel are the yang to the yin of equitable tolling and the discovery rule. Petitioner’s proposal to leave intact all equitable doctrines except the one—laches—that is fatal to her claim is as inequitable as it is unprecedented.

2. Congress can eliminate laches and other equitable mechanisms for adjusting claim-filing periods by expressly so stating or by enacting a statute of repose. In amending the Copyright Act in 1957, it did neither.

As petitioner acknowledges, nothing in the text of the Copyright Act removes laches as an available defense to claims of infringement. *See* Pet. Br. 30; *see also* U.S. Br. 24–25. The Copyright Act imposes a *prohibition*: “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). It does not *guarantee* that every

claim can be brought, and does not preclude any defenses.

By contrast, Congress has specifically barred laches as a defense in other statutes. *See, e.g.*, 25 U.S.C. § 640d-17(b) (“Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within two years from [the effective date of this Act]”); *id.* § 653; 42 U.S.C. § 9607(a). These “statutes confirm that Congress knows how to limit a court’s discretion ... when it so desires,” and its “use of explicit language in other statutes cautions against inferring a limitation” in the Copyright Act. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (“if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain”).

Similarly, Congress can foreclose the availability of the laches defense through enacting a statute of repose, which provides fixed bounds on the time in which a plaintiff can bring suit in order to cabin the scope of equitable extensions. *See, e.g.*, 15 U.S.C. § 77m; *see also Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013). As this Court has explained, a statute of repose is “fundamentally inconsistent” with equitable alterations to the limitations period. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). Such a provision therefore precludes the operation of both equitable tolling and laches. *Teamsters*, 283 F.3d at 887 (Easterbrook, J., concurring) (because “equitable extensions are incompatible with periods of repose” and because “if laches is just a mirror image of equitable tolling, then abbreviating the time on account of laches also is inappropriate”).

A case on which petitioner and the government rely (Pet. Br. 28; U.S. Br. 23)—*Merck & Co. v. Reynolds*, 559 U.S. 633 (2010)—confirms this point. When the Court said that it “cannot reconcile [laches principles] with the statute” (*id.* at 652), it was referring to a statute that included a provision of *repose*, not only of limitations. *Id.* at 650 (citing 28 U.S.C. § 1658(b)); *see also* U.S. Br. in *Merck* (No. 08-905), at 21–22. The Copyright Act, by contrast, does not.

3. Petitioner cites the Patent Act and the Lanham Act as two supposed examples of “other intellectual property statutes” that “use language authorizing the defense of laches.” Pet. Br. 31–32 (capitalization altered).

The Patent Act nowhere states that laches is an available defense, yet courts have long applied laches to patent infringement claims, even though the Patent Act has contained a six-year statute of limitations since 1897. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1030 (Fed. Cir. 1992) (en banc); *see also Lane & Bodley*, 150 U.S. at 201. Petitioner contends that the Patent Act “includes language that *may* authorize the defense of laches” (Pet. Br. 31 (emphasis added)), but the language she points to—allowing as a defense the “absence of liability for infringement or unenforceability” (35 U.S.C. § 282(b)(1))—generally limits patent defenses to those provided for in the Patent Act itself. *See Aristocrat Techs. Austl. Pty Ltd. v. Int’l Game Tech.*, 543 F.3d 657, 664 (Fed. Cir. 2008). Yet background equitable defenses are also applied in patent cases. *See, e.g., Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1285 (Fed. Cir. 2011) (en banc) (inequitable conduct).

There is no principled basis on which this Court could rule that laches is available in patent infringement cases but not in copyright infringement cases. Petitioner’s effort to do away with laches in the latter but not the former ignores the “historic kinship between patent law and copyright law.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 & n.19 (1984); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006). More generally, this Court has long recognized that owners of property—whether real or intellectual—may effectively abandon their rights to exclusive enjoyment and use through unreasonable, prejudicial delay. *See, e.g., Planing-Mach. Co. v. Keith*, 101 U.S. 479, 487–88 (1880) (patent); *Godden v. Kimmell*, 99 U.S. 201, 202, 212 (1879) (real property).

To be sure, the Lanham Act includes an unusual provision, which states that “equitable principles, including laches, estoppel, and acquiescence, are applicable” defenses against trademark infringement claims. 15 U.S.C. § 1115(b)(9). But this Court has never required express statutory authorization to apply laches or any other equitable doctrine and, in fact, applied laches in trademark cases long before the Lanham Act was passed in 1946 with this reference to laches. *See McLean*, 96 U.S. at 258. This Court has also recognized, in directly analogous circumstances, that “[t]he absence of such express language in the copyright statute does not preclude” application of common-law rules “imposed in virtually all areas of the law.” *Sony*, 464 U.S. at 435. As explained next, the absence of express reference to laches and other equitable doctrines in the Copyright Act is the result of a congressional determination to give *more* flexibility to courts, not less.

4. When Congress amended the Copyright Act in 1957, it clearly expressed its intention that equitable principles would continue to apply to infringement claims. Congress considered and rejected the idea of “specifically enumerating certain equitable considerations which might be advanced in connection with civil copyright actions.” S. Rep. No. 85-1014, at 2 (1957). Although the Lanham Act, enacted a decade before, contained such a list, Congress decided that this approach would be “unnecessary” in the copyright context given that “[f]ederal district courts, generally, recognize these equitable defenses anyway.” *Id.* at 3 (citation omitted); *accord* H.R. Rep. No. 85-150, at 2 (1957). As the Senate Report explained, a “person in court normally expects the equitable consideration of the locality to apply. A specific enumeration of certain circumstances or conditions might result in unfairness to some persons.” S. Rep. No. 85-1014, at 3.

While petitioner contends that this history “confirms that laches cannot constrict the Copyright Act’s express statute of limitations” (Pet. Br. 33), she points to no statement in the legislative history intimating that laches could no longer apply to copyright claims. Instead, she observes only that laches was “never mentioned” (*id.* at 34), but this Court has rightly abjured that mode of analysis. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark”). Congress expected district courts to apply equitable discretion to copyright claims, and laches is part and parcel of that authorization.

5. Petitioner’s own insistence on the existence of a rolling statute of limitations (*see* Pet. Br. 18–24)

confirms that the 1957 amendment did not eliminate the availability of laches as a defense against copyright infringement claims. As this Court has recognized, laches is a necessary component of a regime governed by a rolling limitations period. *See Morgan*, 536 U.S. at 121–22.

a. By 1991, petitioner was on full notice of her rights, she was aware of respondents’ alleged acts of infringement, it was foreseeable that such acts would continue, and she could have brought this identical lawsuit at that time. *See* Pet. App. 9a; *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 419 (2005) (“a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief”) (citation omitted). But she did not bring suit for 18 years.

Although the statute of limitations under the Copyright Act is three years, petitioner asserts that its rolling nature permits her to sue, and recover, for violations within the preceding three years even if the allegedly infringing acts were known, and the identical claim initially accrued, long before suit was filed. Pet. Br. 22–23 & n.6; U.S. Br. 10–14. She alleged that the continued distribution of *Raging Bull* infringed her rights within the three years preceding her 2009 complaint (*see* J.A. 27–28), and the courts below assumed that this claim was timely. *But see* D.C. Dkt. 29, at 8. Such an approach is not unprecedented. *See, e.g., Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994); *Nimmer, supra*, § 12.05(B).

b. Before Congress adopted a federal statute of limitations in 1957, courts treated *state* statutes of limitations as rolling in copyright infringement claims. *Baxter v. Curtis Indus., Inc.*, 201 F. Supp.

100, 101 (N.D. Ohio 1962) (describing “the weight of authority” before the 1957 amendment). At the same time, however, courts relied on the laches defense to protect defendants in copyright infringement cases from lengthy, prejudicial delays. *See, e.g., West Publ’g Co. v. Edward Thompson Co.*, 176 F. 833, 838 (2d Cir. 1910) (16-year delay). The courts have applied the same approach in post-1957 cases. *See, e.g., Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226–28 (9th Cir. 2012) (10-year delay).

As this case illustrates, a rolling statute of limitations allows the plaintiff to delay bringing an action indefinitely so long as the defendant continues to engage in the allegedly infringing conduct. Copyright defendants often engage in the repeat or serial exploitation of the same work, including by continually distributing a theatrical film through various media. *See, e.g., Danjaq*, 263 F.3d at 954. And copyrights have very long terms—petitioner represents, for example, that her renewal rights in the 1963 screenplay will not expire until 2051. Pet. Br. 45; *see also* 17 U.S.C. § 304(a). These are precisely the circumstances in which laches has an important role to play. Laycock Br. 24 (“if defendant continues to infringe, the statute of limitations may never run, and there is no way to take account of legitimate reliance interests without invoking laches or estoppel”).

The 1909 Copyright Act’s system of renewal rights virtually ensures that *some* claims, particularly those brought by an author’s heirs, will be temporally removed from the original acts of authorship. Pet. Br. 52–54; *see Stewart v. Abend*, 495 U.S. 207 (1990). But the fact that *Abend* claims are, by definition, brought after an author’s death makes the availability of laches *more* necessary, not less. Respondents do not seek to task petitioner with any de-

lay before her father died in 1981 or she filed her renewal registration in 1991. At that time, however, she could have initiated this identical suit; but she chose not to sue for another 18 years. In theory, she could have waited for decades longer if respondents continued to distribute *Raging Bull*.

c. This Court has never considered a rolling statute of limitations for copyright infringement cases. U.S. Br. 12 n.2. Petitioner therefore points to cases decided under different federal statutes as analogous. Pet. Br. 20 (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192 (1997) (MPPAA); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (civil RICO, governed by the Clayton Act's statute of limitations); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (Clayton Act)); *see also* U.S. Br. 12 n.2.

What petitioner leaves out is that this Court has concluded that civil claims to enforce these very statutes—none of which expressly authorizes laches—are subject to the defense of laches. *See Bay Area Laundry*, 522 U.S. at 205 (MPPAA); *California v. Am. Stores Co.*, 495 U.S. 271, 295–96 (1990) (Clayton Act). The analogies drawn by petitioner thus conform precisely to the historical experience under the Copyright Act: If the statute of limitations continuously rolls forward, then the equitable doctrine of laches must remain available to curtail abuses. *See Am. Stores*, 495 U.S. at 298 (Kennedy, J., concurring) (where a claimant “could have sued ... earlier” but “chose not to do so,” the “consequences” of that choice “may include the bar of laches”) (citation omitted).

Indeed, where, as here, a plaintiff can delay filing a suit indefinitely, this Court has insisted on the

availability of laches. For instance, in accepting a continuing violation theory for hostile work environment claims under Title VII—an approach the government describes as “consistent” with a rolling statute of limitations (U.S. Br. 13 n.2)—this Court noted that “an employer may raise a laches defense ... in the face of unreasonable and prejudicial delay.” *Morgan*, 536 U.S. at 121–22. As it explained, laches ensures that employers are not left “defenseless against employees who bring hostile work environment claims that extend over long periods of time.” *Id.* at 121.

Morgan—a very close modern analogue to this case—eviscerates one of petitioner’s lower-court authorities. See Pet. Br. 28 (citing *Ashley v. Boyle’s Famous Corned Beef Co.*, 66 F.3d 164 (8th Cir. 1995) (en banc)). Petitioner does not even cite *Morgan*, let alone try to distinguish it. Yet *Morgan* confirms that laches is the equitable counterbalance to the indefiniteness injected into civil litigation by a rolling statute of limitations. Petitioner cannot invoke a rolling statute of limitations without being subject to equitable defeasance.

* * *

If federal courts were prohibited from exercising their traditional equitable powers, as petitioner proposes, then they could no longer apply equitable tolling, the discovery rule, or estoppel in addition to laches. Either the federal courts are empowered to do equity or they are not; and if the Constitution and the Copyright Act permit the exercise of any equitable doctrine then they must perforce allow a laches defense in appropriate cases. Petitioner offers no reason (because there is none) why laches should be treated as the unicorn doctrine that got left behind

when all the other equitable principles boarded the Ark. That is because federal courts retain *all* their traditional equitable powers, including laches, in cases brought to enforce the Copyright Act. Therefore the judgments below should be affirmed.

II. THE LOWER COURTS PROPERLY APPLIED THE LACHES DEFENSE IN THIS CASE

As a fallback to her submission that laches can never be applied in an action to enforce the Copyright Act, petitioner also argues that laches cannot bar either of the principal remedies available in civil actions to enforce that statute—*viz.*, “monetary remedies provided by § 504” or “injunctive relief” under “§ 502(a).” Pet. Br. 39, 47. The government argues that courts may consider “laches with respect to equitable but not legal relief.” U.S. Br. 26–27.

These arguments were not presented or passed upon below, and should not be considered by this Court in the first instance. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, the district court did not abuse its discretion in barring petitioner’s copyright infringement claim in its entirety. *Gardner*, 342 U.S. at 30–31; *see also Morgan*, 536 U.S. at 121.

A. Laches May Bar An Entire Claim Regardless Of The Relief Sought

1. The government argues that because “petitioner sought damages as well as an injunction and profits, the courts below erred in invoking laches as a ground for barring the suit entirely.” U.S. Br. 28. Under the government’s approach, which has no support in history or precedent, the defendant would be forced to stand trial—even where the elements of laches have been proved at the outset—so long as the

plaintiff included a single request for “legal” damages in her prayer for relief. In egregious cases like this one, however, it would be both unfair and unjust to put the defendant to the expense of a trial on the merits. The government’s efforts to sap laches of its vitality in those cases where it is needed most should be rejected.

To be clear: District courts undoubtedly have discretion to apply laches, in appropriate cases, to bar some *claims* but not others; or some *remedies* but not others. *See, e.g., McLean*, 96 U.S. at 253 (in trademark case, laches barred requests for accounting and profits, but not injunction). But this discretion runs both ways, and also allows courts, in appropriate cases, to bar the entire action. *See, e.g., McKnight*, 42 U.S. (1 How.) at 169 (plaintiffs’ “own negligence can give them no right to call into action the powers” of the court and thus the entire “bill [must be] dismissed”); *see also* Restatement (Third) of Unfair Competition § 31 (1995) (trademark “owner may be barred in whole or in part” from relief based on laches).

This Court has recognized throughout its history that because delay in bringing suit can be “continued [for] so long and under such circumstances as to defeat the right itself” (*Menendez v. Holt*, 128 U.S. 514, 523 (1888)), laches may “bar[] a plaintiff from *maintaining a suit*.” *Morgan*, 536 U.S. at 121 (emphasis added); *see also, e.g., City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 (2005) (claimant barred by laches from reviving its claim “in whole or in part”); *Benedict v. City of New York*, 250 U.S. 321, 325 (1919) (affirming determination that entire “suit was barred by laches”); *Underwood v. Dugan*, 139 U.S. 380, 384 (1891) (“if laches is ever recognized as a *complete bar*, it ought to be in this

case”) (emphasis added). The government’s newfangled approach to laches cannot be squared with these precedents.

Indeed, just as it cannot be said that laches *always* bars an entire claim, it would be equally against the nature of equity to declare that it can *never* do so. “Equity eschews mechanical rules; it depends on flexibility.” *Holmberg*, 327 U.S. at 396; *see also Am. Stores*, 495 U.S. at 284 (equitable remedies are “flexible and capable of ... reconciliation between the public interest and private needs as well as between competing private claims”) (internal quotation mark and citation omitted).

This Court recently reaffirmed that equitable discretion is case-specific (*eBay*, 547 U.S. at 392–93), a holding that is fully consistent with the longstanding rule that the application of laches is “a question primarily addressed to the discretion of the trial court.” *Gardner*, 342 U.S. at 30. The district court here exercised its discretion to determine that “[t]here are strong equitable arguments against allowing *this action* to proceed.” Pet. App. 46a (emphasis added). Since petitioner never suggested below that a lesser sanction should be applied, the court could not have abused its discretion in dismissing her entire claim.

2. An entire claim may be precluded to prevent *evidentiary* prejudice, because where evidence necessary to defend against *liability* has been lost due to the claimant’s unreasonable delay, a defendant is hamstrung in its ability to defend against the claim altogether, not just a particular remedy. In such cases, district courts must have the discretion to apply laches as a “complete bar.” *Underwood*, 139 U.S. at 384 (prejudice included death of material witness-

es). Otherwise, courts may be forced “to grope after the truth of facts involved in the mists and obscurity consequent on ... a lapse of time” during which witnesses passed away and memories faded while a plaintiff sat on her rights. *Badger v. Badger*, 69 U.S. (2 Wall.) 87, 95 (1865); *see also Russell*, 309 U.S. at 287 (where “evidence is lost or obscured” from delay, laches protects against prejudice to defendant “if the *suit* were allowed”) (emphasis added).

Copyright cases often are rife with factual disputes over access, authorship, ownership, and independent creation. Registration is only *prima facie* evidence of authorship and ownership (17 U.S.C. § 410(c)), and could be rendered irrebuttable by death or disappearance of witnesses or documents. Independent creation is a complete defense to a copyright action (*Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)), and if a plaintiff waits until the authors have died, it may become impossible for the defendant to prove independent creation. Delay can thus render key evidence unavailable in a way that deprives a defendant of an available defense.

Petitioner and the government all but ignore the evidentiary prejudice to respondents that the district court found and relied on in applying laches. *See* Pet. Br. 11, 54–56; U.S. Br. 17. Moreover, a district court, in its discretion, may determine that expectations-based prejudice alone may warrant barring an entire claim—*e.g.*, where the delay is so unreasonable and the investment so great as to render the entire claim inequitable. *Danjaq*, 263 F.3d at 956. As explained in Part II.B.1. below, the district court’s findings that respondents would be prejudiced by petitioner’s unreasonable delay provide ample support for the dismissal of her entire claim.

3. Petitioner argues that laches cannot bar requests for “relief at law,” including all of the monetary relief she seeks under the Copyright Act. Pet. Br. 47, 49–50; *see also* U.S. Br. 26–28. To the extent this argument has not been forfeited, it should be rejected.

a. This is not an action “at law,” but a “civil action” asserting equitable claims, seeking equitable relief, and subject to equitable defenses. Fed. R. Civ. P. 2, 8(c)(1). After 1938, “[r]eference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.” Fed. R. Civ. P. 2 advisory committee note (1937). Defendants in any “civil action” under the merged Federal Rules may assert laches as an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... laches”); *Aukerman*, 960 F.2d at 1031 (“the right to interpose the equitable defense of laches in a civil action is specifically recognized” in Rule 8(c) and thus “we are unpersuaded that the technical distinction between application of laches against legal damages and an equitable accounting ... should be made”); *Maksym v. Loesch*, 937 F.2d 1237, 1247–48 (7th Cir. 1991).

Indeed, equitable defenses (including laches) were available in actions at law even before the merger. The Law and Equity Act of 1915 authorized equitable defenses “without having to resort to a separate bill in equity.” *Aukerman*, 960 F.2d at 1031 (citing 38 Stat. 956, previously codified at 28 U.S.C. § 398). Under that statute, the district court, “exercising what is essentially an equitable jurisdiction, in effect grant[ed] or refuse[d] an injunction restraining proceedings at law.” *Enelow v. N.Y. Life Ins. Co.*,

293 U.S. 379, 383 (1935), *rev'd on other grounds, Gulfstream*, 485 U.S. 271. It was “later repealed as being obsolete” in light of the Federal Rules. *Aukerman*, 960 F.2d at 1031; *see* Act of June 19, 1934, § 2, 48 Stat. 1064 (authorizing this Court to “secure one form of civil action and procedure for both” law and equity cases).

The Copyright Act’s statute of limitations provides that “[n]o *civil action* shall be maintained ... unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b) (emphasis added). By using the language of Rule 2 (which by then had been in force for a generation), Congress understood that all the affirmative defenses—including laches—listed in Rule 8 for “civil actions” would be available.

Accordingly, this Court and others have affirmed the application of laches in cases that, prior to 1938, would not have been brought in equity. *E.g.*, *Morgan*, 536 U.S. at 121 (“an employer may raise a laches defense, which bars a plaintiff from maintaining a suit [under Title VII] if he unreasonably delays in filing a suit and as a result harms the defendant”); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 275 (2d Cir. 2005) (this Court’s teachings do “not limit application of these equitable defenses to claims seeking equitable relief”); *Teamsters*, 283 F.3d at 881; *Aukerman*, 960 F.2d at 1031.

Petitioner and the government place great weight on the statement in *Mack* that “[l]aches within the term of the statute of limitations is no defense at law.” 295 U.S. at 489; *see* Pet. Br. 28; U.S. Br. 26, 28. But whatever this observation meant before the 1938 merger of law and equity, it has no relevance now that the divided bench has been united. *See Aukerman*, 960 F.2d at 1031; *Maksym*, 937 F.2d at

1247–48. Most of the other cases petitioner cites for the proposition that laches does not apply to legal relief similarly predate the merger and are thus inapposite. Pet. Br. 50; *see also* U.S. Br. 26.

Petitioner’s post-merger cases hold only that the Seventh Amendment right to a jury trial adheres when parties seek damages. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (copyright); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477–78 (1962) (trademark). Even in such cases, the right to a jury trial attaches to all issues common to both legal and equitable claims brought in a single civil action. *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). Nothing in these cases suggests that available defenses can be limited based on the plaintiff’s choice to seek legal, in addition to equitable, relief. Nor could such a limitation be constitutionally imposed. *See Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 739 (1970) (due process requires opportunity to raise “all available defenses ... to a competent tribunal”).

That leaves just two post-merger cases in which this Court has, in the government’s carefully chosen words, “discountenanced the application of a laches defense to bar legal relief.” U.S. Br. 23 (citing *Merck*, 559 U.S. at 652; *Cnty. of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 244 n.16 (1985)). But the question whether applying laches to a purely legal claim would be “novel” was not presented or decided in *Oneida*: After explaining that “we do not reach this issue” (470 U.S. at 244), the Court focused its limited discussion of laches on potential “inconsisten[cies] with established federal policy” if laches were applied in light of statutory protections of Indian tribal land—factors entirely absent here. *Id.* at 245 n.16. And the Court in *Merck* merely quoted one

line from a *pre-merger* laches case when analyzing the separate question of when a statutory limitations clock begins ticking. 559 U.S. at 652.

As both petitioner and the government concede (Pet. Br. 60; U.S. Br. 27), a prayer for legal relief does not preclude the application of *other* doctrines of equitable origin, such as estoppel, either before or after the merger. See *Kirk v. Hamilton*, 102 U.S. 68, 78 (1880) (despite estoppel’s “deriv[ation] from courts of equity,” its application “should [not] be restricted in courts of law”) (citation omitted); Laycock Br. 25 (“Most of the other equitable defenses ... have been fully assimilated to law”). The same “reason for invoking laches or estoppel—the need to protect substantial and legitimate reliance—applies to legal as well as equitable remedies.” Laycock Br. 18. When it comes to laches, there is no reason to maintain the pre-merger distinction between legal and equitable remedies. Cf. *Gulfstream*, 485 U.S. at 284 (rejecting same distinction in another context as an “intellectual infelicity” that proved “hopelessly unworkable in operation”).

b. Petitioner is simply wrong to contend that all “[a]ctions seeking monetary relief for copyright infringement are actions at law.” Pet. Br. 49. While petitioner seeks monetary relief, her complaint does not request *legal* damages, and thus the arguments petitioner and the government advance regarding legal relief are impermissible requests for an advisory opinion. *Muskrat v. Unites States*, 219 U.S. 346, 362–63 (1911).

Petitioner invokes *Feltner*, which held that *statutory damages* under the Copyright Act are legal remedies that trigger the Seventh Amendment right to a jury trial. 523 U.S. at 353. Petitioner, however, has

not sought statutory damages (J.A. 29–35) and therefore this point is irrelevant in the present context (although laches would be an available defense even if she had). As *Feltner* recognized, the Copyright Act also authorizes “actions for monetary relief that [this Court has] characterized as equitable, such as actions for disgorgement of improper profits.” 523 U.S. at 352.

Petitioner has pleaded no out-of-pocket or consequential losses, and she does not seek damages for being unable to exploit the copyright herself. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (describing compensatory damages as “the classic form of legal relief”) (emphasis omitted). Rather, she seeks only to recover the amounts “derived by” respondents from their alleged “copyright infringement.” J.A. 34. Thus, the only form of monetary relief petitioner seeks is the precise remedy *Feltner* described as *equitable*: An apportionment of profits as authorized by the Copyright Act in infringement actions. 523 U.S. at 352; see also 17 U.S.C. § 504(b).

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), this Court explained that before the enactment of the Copyright Act of 1909, courts had allowed a plaintiff to recover profits in a copyright action “as appropriate equitable relief incident to a decree for an injunction.” *Id.* at 399. This relief followed “the principles governing equity jurisdiction” in that it was intended not to punish, “but to prevent an unjust enrichment.” *Ibid.* Congress codified that form of relief in Section 25(b) of the Copyright Act of 1909—the predecessor of 17 U.S.C. § 504(b). *Sheldon*, 309 U.S. at 400. As a result, the present remedy of an accounting for profits was “based upon the same equitable principles in cases of copyright infringement” that equity courts had previously ap-

plied. *Id.* at 401; *see also* U.S. Br. 19; 4 Pomeroy, *supra*, § 1352, at 959 (for copyright and patent infringement, “[t]he ordinary form of relief is an accounting of profits and an injunction in equity”).

Despite the equitable origin and nature of the disgorgement or apportionment of profits remedy, petitioner suggests that laches can *never* preclude such relief. Pet. Br. 47–49. The very cases petitioner relies upon elsewhere in her brief foreclose this contention. *Menendez*, 128 U.S. at 524 (laches barred accounting of profits in trademark action); *McLean*, 96 U.S. at 257 (“Cases frequently arise where a court of equity will refuse the prayer of the complainant for an account of gains and profits, on the ground of delay in asserting his rights”); *see also Haas*, 234 F. at 108 (“Equity will control its peculiar remedy of an account of profits according to its own sense of justice”).

4. Petitioner is equally wrong in asserting that laches can *never* preclude injunctive relief. *See* Pet. Br. 38–44.

Petitioner’s argument that barring injunctive relief would “amount to [a] compulsory uncompensated licens[e]” (Pet. Br. 38 (capitalization altered)) assumes that copyright owners are *always* entitled to injunctions to prevent infringement. But that is simply incorrect. *eBay*, 547 U.S. at 392–93 (“this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed”). There are numerous reasons why a copyright owner cannot prevent another’s use of her work. *See, e.g.*, 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (copyright owner cannot enjoin continued use of derivative work after

author or heirs terminate the grant); *id.* § 304(a)(4)(A) (same where author or heirs fail to timely apply for renewal registration). This Court has also recognized that because “the fair use enquiry often requires close questions of judgment[,] ... the goals of the copyright law ... are not always best served by automatically granting injunctive relief.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994).

Unsurprisingly, the Court has squarely held that “[t]he defense of laches [can] be asserted” against a plaintiff’s requests for “*injunctive remedies.*” *Abbott Labs.*, 387 U.S. at 155 (emphasis added); *see also*, e.g., *Saxlehner v. Nielsen*, 179 U.S. 43, 45 (1900) (finding that plaintiff was “guilty of laches ... preclude[d] her right to an injunction”); *Lane & Bodley*, 150 U.S. at 201 (laches barred injunctive relief in patent infringement suit); 2 *Pomeroy*, *supra*, § 418, at 170 n.3 (“in applications to restrain by injunction ..., the rule is well settled that ... a comparatively short delay may be laches sufficient to defeat [a plaintiff’s] remedial right”).

Petitioner, ignoring this long line of authority, rests her argument on a case in which the Court approved a lower court decision holding that laches barred the remedy of accounting but not the requested injunction. *Menendez*, 128 U.S. at 523–25; *see also McLean*, 96 U.S. at 258. But injunctions, like all of equity, are discretionary. *eBay*, 547 U.S. at 391. *Menendez* and *McLean* are thus nothing more than examples of a court’s discretion to apply laches to bar an entire claim in some cases and only certain remedies in others depending on the evidence of prejudice before it. *Menendez*, 128 U.S. at 523; *McLean*, 96 U.S. at 253 (“Equity courts will not, *in general*, refuse an injunction on account of delay in seeking re-

lief, where the proof of infringement is *clear*”) (emphases added).

“[I]n all ... petitions for equitable relief, he who seeks equity must do equity.” *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947); *accord* 2 Pomeroy, *supra*, § 418, at 170. Having asked a federal court to award equitable remedies, petitioner can hardly complain that the same court applied an equitable defense.

**B. Petitioner’s Entire Claim Is Barred
By Her Unreasonable Delay And The
Resulting Prejudice**

The government’s argument that the court of appeals applied an improper “presumption” in favor of laches (U.S. Br. 15–20) is one that petitioner does not advance. Accordingly, this Court should not reach it. *See, e.g., Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. 11 (U.S. Dec. 3, 2013).

In all events, neither the district court nor the Ninth Circuit *presumed* prejudice; rather, respondents *proved* that they were prejudiced by petitioner’s unreasonable delay. This Court should not disturb the district court’s discretionary, fact-bound judgment in this respect. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (“both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task”). Tellingly, petitioner does *not* argue in this Court that either of the courts below erred in its application of the laches doctrine to the undisputed facts of this case.

1. Laches applies where the claimant has waited unreasonably long to assert the claim, and the defendant is prejudiced by the resulting delay. *Costello*, 365 U.S. at 282. This was the standard applied

by the district court and the court of appeals. Pet. App. 7a–8a, 42a. The court of appeals recognized that *respondents* bore the burden to prove both of the *Costello* elements (Pet. App. 8a), then engaged in a detailed analysis of the undisputed facts the district court found supported each one (Pet. App. 9a–18a).

a. Petitioner waited *18 years* after her claim initially accrued before suing respondents for infringing her alleged rights in *Raging Bull*. As the court of appeals explained, it was “[u]ndisputed” that petitioner knew of her potential claim since 1991, the year she retained an attorney to file her renewal application for the 1963 screenplay. Pet. App. 9a (alteration in original); see Pet. App. 42a. And it was entirely foreseeable that respondents would continue to distribute *Raging Bull*.

The government intimates that it was improper for the district court to use the 1991 renewal date as the triggering event for laches (U.S. Br. 15), although it nowhere explains why, nor does it propose an alternative date. This Court has recognized that laches is measured from the beginning of a series of repeated wrongs precisely so that defendants are not left “defenseless” against prejudicial delay from a rolling limitations period. See *Morgan*, 536 U.S. at 121. As the courts below found—and petitioner does not dispute—that date was 1991 on the particularized (and undisputed) facts of this case.

Petitioner *conceded* that she waited to file because “the film was deeply in debt and in the red and would probably never recoup.” J.A. 110. Petitioner could not recall “any other reason ... for not immediately making a claim in 1991, when [she] first engaged counsel.” J.A. 111; see also Pet. App. 11a (“the evidence suggests the true cause of [petitioner’s] de-

lay was, as she admits, that ‘the film hadn’t made money’ during this time period”).

This is precisely the brand of opportunism that the laches defense has guarded against throughout its existence: Laches “forbids a court of equity to interfere” where, “doing nothing himself,” a plaintiff waits to see what the outcome of an investment will be. *McCabe v. Matthews*, 155 U.S. 550, 556 (1895); *see also Haas*, 234 F. at 108.

Petitioner belatedly asserted that her delay was caused by her need to care for family members. J.A. 294. Petitioner did not offer this excuse in her deposition, and as the court of appeals properly concluded, there was “no explanation” in the record “as to why or how [petitioner’s] brother’s disability and her mother’s illnesses had any impact on her failure to file this lawsuit,” making this justification “insufficient.” Pet. App. 10a–11a. Her latest excuse—a supposed conflict of interest that admittedly has no support in the record (*see* Pet. Br. 7 & n.2)—likewise cannot suffice.

b. The record also amply demonstrated both expectations-based prejudice and evidentiary prejudice to respondents from petitioner’s unreasonable delay.

i. The district court’s finding of expectations-based prejudice is consistent with the canonical statement that it is inequitable for a copyright owner “to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.” *Haas*, 234 F. at 108; *see also, e.g., Wollensak v. Reiher*, 115 U.S. 96, 99 (1885); 2 Howard B. Abrams, *The Law of Copyright* § 13:48 (2012) (expectations-based prejudice includes the “coming into existence of business plans and relationships based on

reliance on the state of affairs challenged by the claims of the litigation”).

Respondents have distributed *Raging Bull* continuously since the time petitioner first learned of her rights, “expend[ing] substantial financial and other resources as a part of this effort,” including “costs related to marketing, advertising, distributing and otherwise promoting the Film in various media.” J.A. 39. All told, respondents have invested nearly \$8.5 million in U.S.-based promotion and distribution efforts alone since 1991, and have entered into numerous licensing and distribution agreements with multiple third parties. J.A. 40–41. Each of “[t]hese activities and expenditures [was] made based on the understanding and belief that [respondents] have complete ownership and control of the Film” (*ibid.*), and the legitimate expectation that, having taken all of the risk of investing their efforts and money, they would be entitled to all, not a portion of, the profits from such investment.

Contrary to the government’s contention, the court of appeals did not conclude “simply” that respondents made “significant expenditures to market and distribute *Raging Bull*.” U.S. Br. 18. Nor did the court credit petitioner’s unsupported assertion that respondents “would not have done anything different[ly], or been in any better position, had the suit been filed sooner.” Pet. App. 15a. Instead, the court concluded that respondents were *prejudiced* by these risky expenditures because they were made in justifiable reliance “upon their belief that they were the rightful owners of the right to exploit *Raging Bull*.” Pet. App. 17a. This is not a case of willful or “deliberate pira[cy].” *Haas*, 234 F. at 108. Rather, respondents invested in this project (and forewent others) on the good-faith understanding that the 1976

assignment was valid and that Petrella's express representation that the book came first was both truthful and binding.

Allowing petitioner's claim to go forward would be an invitation for copyright trolls to wait for productive entities, like respondents, to invest enough to make a work profitable before filing suit. For this reason, expectations-based prejudice can warrant the invocation of laches. *See Underwood*, 139 U.S. at 383–84 (laches barred claim where property in question “bec[a]me of value” only after defendants had “occupied and improved the property in full reliance upon the sufficiency of the title they possessed”).

ii. The district court also correctly determined that respondents would be prejudiced by the loss of evidence necessary to defend against petitioner's infringement claim.

Laches “promote[s] justice” by protecting against “the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 301 (1946) (citation omitted). For this reason, a claimant's unreasonable delay may bar her claim where loss of key evidence hinders the opponent's ability to mount its defense. *See, e.g., Cnty. of Buena Vista*, 95 U.S. at 161.

The court of appeals, having found expectations-based prejudice, did not review the district court's finding of evidentiary prejudice. Pet. App. 12a. This Court, of course, may affirm on the basis of “specific findings of fact by the District Court, undisturbed by the Court of Appeals.” *Ford Motor Co. v. EEOC*, 458 U.S. 219, 225 n.7 (1982); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (“The prevailing

party may, of course, assert in a reviewing court any ground in support of his judgment”). Importantly, neither petitioner nor the government argues that the district court’s evidentiary prejudice finding was clearly erroneous. *See, e.g., Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009) (“courts of appeals may not set aside a district court’s factual findings unless those findings are clearly erroneous”) (citing Fed. R. Civ. P. 52(a)).

The government concedes that evidentiary prejudice “is more likely [than expectations-based prejudice] to result from a long delay than from a short one.” U.S. Br. 17 (citing *Russell*, 309 U.S. at 287 (prejudice may result when “in the normal course of events evidence is lost or obscured”)). This is such a case.

Petitioner’s infringement claim turns on contested issues of chronology and historical events. Resolving it would require careful, fact-specific inquiries into questions such as whether characters, settings, and snatches of dialogue in the screenplays and movie track historical reality rather than reflect dramatic license (which petitioner herself characterizes as a “critical issue,” Pet. Br. 12); whether Petrella was the sole author of the 1963 screenplay or whether he co-authored it with LaMotta; and which of three separate works came first and which (if any) were derivative of the others. *See, e.g.,* Pet. App. 34a–42a. The copyright dates of the works cannot answer that question, nor can the content of the book—all of which except for the last couple of pages and a few photographs pertain to events prior to 1961. J.A. 165–92. Petitioner essentially concedes as much by premising her effort to contravene her late father’s contractual representations on the “Heller letter” (Pet. Br. 10 n.4)—without telling the Court

that this evidence was ruled *inadmissible* by the district court. J.A. 293.

During the 18-year period of petitioner's delay, the three remaining witnesses to the critical facts became unavailable. Petrella's wife and LaMotta's ex-wife died during this period, and LaMotta himself became incapable of testifying. Pet. App. 46a. Petitioner takes the position that "historical fact witnesses are likely to be relatively unimportant" (Pet. Br. 17)—but she has to say that, since they are all dead or unavailable. Petitioner also argues that other persons—such as director Martin Scorsese and actor Robert De Niro (*id.* at 53 n.13)—could be called to testify, but they would have little to add to a dispute regarding authorship of works created by others years before the film was made.

As the district court recognized, evidentiary prejudice is concerned with whether specific, material witnesses are unavailable, not whether some peripheral person might be dragged into the dispute. Pet. App. 46a. This Court, too, has recognized that the unavailability of witnesses central to the defense before a claimant files suit is the quintessential example of evidentiary prejudice. *See, e.g., Whitney v. Fox*, 166 U.S. 637, 648 (1897) (laches barred claim where claimant waited to file until "disease had so far deprived [defendant] of his reason and faculties that he could not sufficiently comprehend any matter of business submitted to him"); *Allore v. Jewell*, 94 U.S. 506, 512 (1876) (laches considers whether, during unexcused delay, "from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible").

It is no answer to speculate that in some cases the claimant, rather than the defendants, might bear

the brunt of the loss of evidence over time. Pet. Br. 54; CSEL Br. 10–11. In such a case, the district court could decline to apply laches. In *this* case, by contrast, the district court made uncontested factual findings, on an undisputed record, that petitioner’s unreasonable delay would prejudice *respondents’* ability to defend against petitioner’s claim of copyright infringement. The court of appeals did not disturb that finding, and petitioner does not even challenge it in this Court. That is sufficient for purposes of this case. See, e.g., *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (“this Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error”).

2. Ignoring all this *evidence*, the government seizes on a drive-by quotation from another decision at the outset of the court of appeals’ opinion (Pet. App. 8a (quoting *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006) (per curiam))), which the government asserts was an “invocation and application” of a *presumption* that laches applies if any part of the alleged misconduct occurred outside the statutory limitations period. U.S. Br. 15. This lone sentence—and not any legal or factual analysis performed by the courts below—forms the basis for the government’s reversal recommendation. *Id.* at 15–18. Yet, even beside petitioner’s failure to raise this issue, this Court “reviews judgments, not statements in opinions.” *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956).

The “presumption” issue is a red herring. The government has not established that the court below even applied such a presumption, much less that it was both erroneous and prejudicial. See, e.g., *Neder v. United States*, 527 U.S. 1, 9–10 (1999) (evidentiary

presumptions are subject to harmless error review). On the contrary, the district court (which nowhere mentioned a “presumption”) made extensive, specific, detailed findings of fact, on an extensive and undisputed record, regarding both of the elements of the laches defense. Whether laches bars a specific claim “is a question primarily addressed to the discretion of the trial court.” *Gardner*, 342 U.S. at 30. The court of appeals reviewed the entire record and found no abuse of discretion. Petitioner does not even challenge that determination, and this Court has no warrant to revisit it—and certainly no license to find any abuse of the discretionary powers traditionally exercised by federal courts.

* * *

With full knowledge of her alleged rights, petitioner bided her time under the bridge for 18 years, waiting for *Raging Bull* to become profitable at the expense and to the detriment of respondents, before belatedly jumping out and demanding her toll. The district court in its equitable discretion determined that petitioner’s delay was so unreasonable, and the expectancy and evidentiary prejudice to respondents so great, that petitioner’s entire claim was barred by laches. That decision was squarely within the district court’s constitutional, statutory, and equitable authority, and was not an abuse of discretion.

CONCLUSION

The judgments below should be affirmed.
Respectfully submitted.

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APPENDIX

APPENDIX

17 U.S.C. § 507 provides:**§ 507. Limitations on actions**

(a) Criminal Proceedings.—Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.

(b) Civil Actions.—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

Act of March 3, 1915, ch. 90, 38 Stat. 956, previously codified at 28 U.S.C. § 398 (former Law and Equity Act) provides:

CHAP. 90.—An Act To amend an Act entitled “An Act to codify, revise, and amend the laws relating to the judiciary,” approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled “An Act to codify, revise, and amend the laws relating to the judiciary,” approved March third, nineteen hundred and eleven, be and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, re-

spectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

“SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

“SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

“SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.”

Approved, March 3, 1915

Act of June 19, 1934, ch. 651, 48 Stat. 1064 provides:

AN ACT

To give the Supreme Court of the United States authority to make and publish rules in actions at law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulga-

tion, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

Approved, June 19, 1934

Federal Rule of Civil Procedure 2 provides:

Rule 2. One Form of Action

There is one form of action—the civil action.

* * *

NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. This rule modifies U.S.C., Title 28, [former] § 384 (Suits in equity, when not sustainable). U.S.C., Title 28, §§ 723 and 730 [see 2071 et seq.] (conferring power on the Supreme Court to make rules of practice in equity), are unaffected insofar as they relate to the rule making power in admiralty. These sections, together with § 723b [see 2072] (Rules in actions at law; Supreme Court authorized to make) are continued insofar as they are not inconsistent with § 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court). See

Note 3 to Rule 1. U.S.C., Title 28, [former] §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N.Y. Code 1848 (Laws 1848, ch. 379) § 62; N.Y.C.P.A. (1937) § 8; Calif. Code Civ. Proc. (Deering, 1937) § 307; 2 Minn. Stat. (Mason, 1927) § 9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255.

* * *

Federal Rule of Civil Procedure 8 provides:

Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

* * *

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). See [former] Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1004, 2-1015; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11305, 11314; Utah Rev. Stat. Ann. (1933), §§ 104-7-2, 104-9-1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (b). 1. This rule supersedes the methods of pleading prescribed in U.S.C., Title 19, § 508 (Persons making seizures pleading general issue and providing special matter); U.S.C., Title 35, [former] §§ 40d (Providing under general issue, upon

notice, that a statement in application for an extended patent is not true), 69 [now 282] (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, [former] Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn. Practice Book (1934) §§ 107, 108, and 122; Conn. Gen. Stat. (1930) §§ 5508–5514. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 17–20.

Note to Subdivision (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) § 242, with “surprise” omitted in this rule.

Note to Subdivision (d). The first sentence is similar to [former] Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see [former] Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 13, 18; and to the practice in the States.

Note to Subdivision (e). This rule is an elaboration upon [former] Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also [former] Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171-4, 432-5; Hankin, Alternative and Hypothetical Pleading (1924), 33 Yale L.J. 365.

Note to Subdivision (f). A provision of like import is of frequent occurrence in the codes. Ill. Rev. Stat. (1937) ch. 110, § 157(3); 2 Minn. Stat. (Mason, 1927)

10a

§ 9266; N.Y.C.P.A. (1937) § 275; 2 N.D. Comp. Laws
Ann. (1913) § 7458.

* * *