American Bar Association
www.supremecourtpreview.org

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 OF AMICUS CURIAE THE CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS IN SUPPORT OF PETITIONER

STEVEN T. LOWE
DANIEL B. LIFSCHITZ
LOWE & ASSOCIATES
11400 Olympic Blvd.
Suite 640
Los Angeles, CA 90064
(310) 477-5811

STEVEN W. SMYRSKI
Counsel of Record
SMYRSKI LAW GROUP, A P.C.
3310 Airport Ave., SW
Santa Monica, CA 90405
(310) 397-9118
steve@smyrski.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTERESTS OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 1
ARGUMENT 3

A. Copyright Law Is Already Designed to Deter Weak Cases 3
B. Plaintiffs Often Gain Little and Lose Much by Delay 10
C. Empirical Data Do Not Show Need For Laches 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Murdoch, 502 Fed. Appx. 107 (2d Cir. N.Y. 2012) 13

Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994) 4, 6, 7

Arden v. Columbia Pictures Industries, 908 F.Supp. 1248 (S.D.N.Y. 1995) 12

Benay v. Warner Bros. Entertainment, Inc., 607 F.3d 620 (9th Cir. 2010) 5, 9

Benjamin v. Walt Disney Company, 2007 U.S. Dist. LEXIS 91710 (C.D. Cal. 2007) 9

Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985) 4

Bethea v. Burnett, 2005 WL 1720631 (C.D. Cal. 2005) 8

Blakeman v. Walt Disney Company, 613 F.Supp.2d 288 (E.D.N.Y. 2009) 13

Brown v. Perdue, 177 Fed. Appx. 121 (2d Cir. 2006) 13

Buggs v. Dreamworks, Inc., 2010 U.S. Dist. LEXIS 141515 (C.D. Cal. 2010) 9

Bunick v. UPN, 2008 U.S. Dist. LEXIS 35536 (S.D.N.Y. 2008) 13

Burns v. Imagine Films Entertainment, Inc., 2001 U.S. Dist. LEXIS 24653 (W.D.N.Y. 2001) 13

TABLE OF AUTHORITIES – Continued

Page

Cabell v. Sony Pictures Entm't, Inc., 425 Fed. Appx. 42 (2d Cir. N.Y. 2011)....................................13

Cavalier v. Random House, Inc., 297 F.3d 815 (9th Cir. 2002) 5

Clements v. Screen Gems, Inc., 2010 U.S. Dist. LEXIS 132186 (C.D. Cal. 2010)................................9

Cosmetic Ideas, Inc. v. IAC/INTERACTIVECORP, 606 F.3d 612 (9th Cir. 2010) 6

Cox v. Abrams, 1997 U.S. Dist. LEXIS 6687 (S.D.N.Y. 1997)...13

Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)..6

DuckHole Inc. v. NBC Universal Media LLLC, 2013 U.S. Dist. LEXIS 157305 (C.D. Cal. 2013)...9

Effects Associates, Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990) 6

Effie Film, LLC v. Pomerance, 909 F.Supp.2d 273 (S.D.N.Y. 2012)..13

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).......................3, 4, 6

Flaherty v. Filardi, 2009 U.S. Dist. LEXIS 22641 (S.D.N.Y. 2009)...13

Flynn v. Surnow, 2003 U.S. Dist. LEXIS 26973 (C.D. Cal. 2003)...8

Funky Films v. Time Warner Entertainment, 462 F.3d 1072 (9th Cir. 2006) 9

TABLE OF AUTHORITIES – Continued

Page

Gable v. National Broadcasting Co., 727 F.Supp.2d 815 (C.D. Cal. 2010) 9

Gilbert v. New Line Productions, 2010 U.S. Dist. LEXIS 27134 (C.D. Cal. 2010)...........................9

Goldberg v. Cameron, 787 F.Supp.2d 1013 (N.D. Cal. 2011)...9, 10

Gregory v. Murphy, 1991 U.S. App. LEXIS 4893 (9th Cir. 1991) 8

Grosso v. Miramax Film Corporation, 2001 U.S. Dist. LEXIS 26199 (C.D. Cal. 2001).................8

Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F.Supp. 1392 (C.D. Cal. 1990)............................6

Hallford v. Fox Entm't Group, Inc., 2013 U.S. Dist. LEXIS 19625 (S.D.N.Y. 2013)........................14

Harmelin v. Michigan, 501 U.S. 957 (1991) 14

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 3

Historical Truth Productions v. Sony Pictures Entertainment, 1995 U.S. Dist. LEXIS 17477 (S.D.N.Y. 1995)...12

Hudson v. Universal Pictures Corporation, 2004 U.S. Dist. LEXIS 11508 (E.D.N.Y. 2004).......13

Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129 (C.D. Cal. 2001)...8

Kamar International, Inc. v. Russ Berrie & Co., 657 F.2d 1059 (9th Cir. 1981) 5, 10

TABLE OF AUTHORITIES – Continued

Page

Kodadek v. MTV Networks, 1996 U.S. Dist. LEXIS 20776 (C.D. Cal. 1996)....................................8

Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042 (9th Cir. 1994) 5, 8

Kretschmer v. Warner Bros., 1994 U.S. Dist. LEXIS 7805 (S.D.N.Y. 1994)....................................12

Lane v. Universal City Studios, 1994 U.S. App. LEXIS 23769 (9th Cir. 1994) 8

Laskay v. New Line Cinema, 1998 U.S. App. LEXIS 23461 (C.D. Cal. 1998)....................................8

Lassiter v. Twentieth Century Fox Film Corporation, 238 Fed. Appx. 194 (9th Cir. 2007)...............9

Latimore v. NBC Universal TV Studio, 480 Fed. Appx. 649 (2d Cir. 2012) 13

Mallery v. NBC Universal, Inc., 331 Fed. Appx. 821 (2d Cir. 2009)..13

Mena v. Fox Entm't Group, 2012 U.S. Dist. LEXIS 143964 (S.D.N.Y. 2012)...............................13

Merrill v. Paramount Pictures Corporation, 2005 U.S. Dist. LEXIS 45401 (C.D. Cal. 2005) 8

Mestre v. Vivendi Universal U.S. Holding Co., 273 Fed. Appx. 631 (9th Cir. 2008)...........................9

Metcalf v. Bochco, 294 F.3d 1069 (9th Cir. 2002).5, 7, 8

Micro Star v. Formgen Inc., 154 F.3d 1107 (9th Cir. 1998) 6

TABLE OF AUTHORITIES – Continued

Page

Milano v. NBC Universal, Inc., 584 F.Supp.2d 1288 (C.D. Cal. 2008)....................9

Mowry v. Viacom International, Inc., 2005 U.S. Dist. LEXIS 15189 (S.D.N.Y. 2005)....................13

Muller v. Twentieth Century Fox Film Corp., 794 F.Supp.2d 429 (S.D.N.Y. 2011)....................13

Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003)....................7

Novak v. National Broadcasting Company, 752 F.Supp. 164 (S.D.N.Y. 1990)....................12

Novak v. Warner Bros. Pictures, LLC, 387 Fed. Appx. 747 (9th Cir. 2010)....................9

Ostrowski v. Creative Artists Agency, 1994 U.S. App. LEXIS 23732 (9th Cir. 1994)....................8

Pelt v. CBS, Inc., 1993 U.S. Dist. LEXIS 20464 (C.D. Cal. 1993)....................8

Quirk v. Sony Pictures Entm't Inc., 2013 U.S. Dist. LEXIS 47954 (N.D. Cal. 2013)....................9

Rice v. Fox Broad. Co., 330 F.3d 1170 (9th Cir. 2003)....................5, 7, 8

Robinson v. Viacom International, 1995 U.S. Dist. LEXIS 9781 (S.D.N.Y. 1995)....................13

Rodriguez v. Heidi Klum Company, LLC, 2008 U.S. Dist. LEXIS 80805 (S.D.N.Y. 2008)....................13

Roley v. New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994)....................6

TABLE OF AUTHORITIES – Continued

Page

Rosenfeld v. Twentieth Century Fox Film, 2009 U.S. Dist. LEXIS 9305 (C.D. Cal. 2009)....................9

Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003) 7

Shaw v. Lindheim, 809 F.Supp. 1393 (C.D. Cal. 1992)..8

The Sheldon Abend Revocable Trust v. Steven Spielberg, 748 F.Supp.2d 200 (S.D.N.Y. 2010).......13

Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)..4

Stewart v. Wachowski, 574 F.Supp.2d 1074 (C.D. Cal. 2005)...9, 10

Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) 4, 7

Thomas v. Walt Disney Company, 337 Fed. Appx. 694 (9th Cir. 2009)..9

Walker v. Viacom International, Inc., 2010 U.S. App. LEXIS 1475 (9th Cir. 2010)..............................9

Webb v. Stallone, 910 F.Supp.2d 681 (S.D.N.Y. 2012)..14

Weygand v. CBS, 1997 U.S. Dist. LEXIS 19613 (C.D. Cal. 1997)...8

Wild v. NBC Universal, Inc., 2013 U.S. App. LEXIS 4169 (9th Cir. 2013) 10

Williams v. Crichton, 84 F.3d 581 (2d Cir. 1996).......13

TABLE OF AUTHORITIES – Continued

Page

Willis v. HBO, 2001 U.S. Dist. LEXIS 17887 (S.D.N.Y. 2001) 13

Zella v. E. W. Scripps Company, 529 F.Supp.2d 1124 (C.D. Cal. 2007) 9

STATUTES

17 U.S.C. §103 3

17 U.S.C. §107 7

17 U.S.C. §§108-122 7

17 U.S.C. §411(a) 4, 6

17 U.S.C. §507(b) 6

OTHER AUTHORITIES

4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (2011) 4, 5

U.S. Copyright Office, Circular 1, "Copyright Basics" 4

Steven T. Lowe, Death of Copyright, L.A. LAWYER, Nov. 2010 3

Steven T. Lowe & Daniel Lifschitz, Death of Copyright, the Sequel, THE COMPUTER & INTERNET LAWYER, Sept. 2012 3

INTERESTS OF AMICUS CURIAE[1]

Amicus curiae the California Society of Entertainment Lawyers (CSEL) is a recently formed non-profit, non-partisan, professional organization of attorneys representing authors, screenwriters, songwriters, and other creators of intellectual property in the entertainment industry. CSEL seeks to balance the influence of the international conglomerates within the television, film, and music industries through education, public-policy advocacy, legislation, and litigation.

SUMMARY OF ARGUMENT

As demonstrated in Petitioner's Brief, nothing in the text of the Copyright Act's three-year statute of limitations suggests that the Act authorizes the atextual existence of a laches defense. Speaking more specifically, nothing in the full text of the Copyright Act, nor its legislative history, suggests that the Act provides for *any* equitable doctrine to supersede an explicitly provided statutory one. Thus, the only reason to add the laches defense to copyright law would

[1] Pursuant to Supreme Court Rule 37.6, counsel for Amicus certify that no counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

be to promote an overriding policy requirement. No such compelling policy exists.

In an attempt to retain a defense arsenal of both the statute of limitations and the laches defense as bars to a plaintiff's copyright claim, defendants might suggest that the defense of laches is necessary to prevent a proverbial "opening of the floodgates" – a tidal wave of opportunistic plaintiffs who have been "sleeping on their rights" and will, if allowed, flood the judicial system with stale claims. This view presumes that copyright suits are easy to litigate and win – a view that is belied by every facet of copyright litigation in both doctrine and practice.

Further, the suggestion has been made that plaintiffs may be emboldened to wait to file copyright claims if the laches defense is unavailable. In practice, no copyright plaintiff gains any worthwhile advantage by delaying a claim, rendering the suggestion nonsensical. Finally, even in those circuits that bar or restrict laches, no empirical evidence exists to support the position that the absence of laches leads to any increase in copyright infringement lawsuits.

In short, any argument that copyright plaintiffs will adversely affect the judicial system if the application of laches is restricted is simply incorrect.

ARGUMENT

A. Copyright Law Is Already Designed to Deter Weak Cases

Copyright infringement lawsuits in the entertainment industry are virtually always vigorously and successfully defended.[2] For illustrative purposes, it is helpful to focus on the jurisdiction that represents the experience of CSEL's membership, namely the jurisdiction from which the instant case (and indeed, a significant amount of copyright litigation within the entertainment industry) arises: the Ninth Circuit. To successfully litigate a copyright infringement claim in the Ninth Circuit, a plaintiff must do all of the following:

First, the plaintiff must demonstrate that he or she owns a valid copyright in the work that the defendant is alleged to have copied from.[3] This requires that the work be original,[4] with its subject matter eligible for copyright protection.[5] The work

---

[2] *See* generally, Steven T. Lowe, Death of Copyright, L.A. LAWYER, Nov. 2010, available at http://www.loweandassociates pc.com/press/publications/death-of-copyright; Steven T. Lowe & Daniel Lifschitz, Death of Copyright, the Sequel, THE COMPUTER & INTERNET LAWYER, Sept. 2012, available at http://www.loweandassociatespc.com/press/publications/death-of-copyright-the-sequel.

[3] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

[4] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-549 (1985).

[5] 17 U.S.C. §103.

must also possess a "national point of attachment"[6] and the copyright registration must comply with any and all applicable statutory formalities.[7] Additionally, if the plaintiff is not the actual creator of the work, the plaintiff must prove a transfer of rights or other relationship between the author and the plaintiff in order to make the plaintiff the valid copyright claimant.[8]

Second, the plaintiff must show that the defendant actually copied from her work,[9] requiring evidence of the defendant's access to the work.[10] When the work has not been widely disseminated, a plaintiff must establish a likelihood of access through "a particular chain of events."[11] Due to its circumstantial nature, this chain will be closely scrutinized and must go beyond "mere speculation or conjecture."[12]

---

[6] *See* 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §5.05 (2011); U.S. Copyright Office, Circular 1, "Copyright Basics," p. 2, available at http://www.copyright.gov/circs/circ01.pdf.

[7] *See, e.g.,* 17 U.S.C. §411(a).

[8] 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §13.01[A] (2011).

[9] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

[10] *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Berkic v. Crichton*, 761 F.2d 1289, 1291 (9th Cir. 1985); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

[11] *Three Boys Music*, 212 F.3d at 482.

[12] *Id.*

However, since direct evidence of copying is almost never available,[13] most chains necessarily involve some level of speculation and are frequently rejected for this very reason.[14]

Third, the plaintiff must show "substantial similarity"[15] between the works; that is to say, even if it is proven that a defendant copied original elements of plaintiff's work, there must be "articulable similarities"[16] between the works sufficient to convince a trier of fact that the copying was actionable, rather than merely random happenstance.[17] Additionally, a trier of fact must determine not only that the works are *objectively* similar in their articulable similarities, but also that they are *subjectively* similar to a reasonable ordinary observer in their "total concept and feel."[18]

---

[13] *Kamar International, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §13.02 [A] (2001).

[14] *See, e.g.*, *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003).

[15] *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010).

[16] *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

[17] *Metcalf v. Bochco*, 294 F.3d 1069, 1074-75 (9th Cir. 2002) (noting that "random similarities scattered throughout" works are insufficient to constitute substantial similarity).

[18] *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

Finally, even if a plaintiff can demonstrate all of the above in court, she must overcome a myriad of defenses available to alleged infringers. These can include that the plaintiff never registered her copyright,[19] or that the copyright has expired,[20] been forfeited,[21] or was abandoned[22] at time of suit. The three-year statute of limitations for an infringement suit to be filed may have run.[23] The court may find that the plaintiff granted permission for his work to be used, either outright or through an implied license.[24] It may be determined that the similarities arise from a common factual premise,[25] a licensed[26] or public domain[27]

---

[19] 17 U.S.C. §411(a); *see Cosmetic Ideas, Inc. v. IAC/INTERACTIVECORP*, 606 F.3d 612 (9th Cir. 2010) (discussing the requirements of registration).

[20] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

[21] *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F.Supp. 1392, 1399 (C.D. Cal. 1990).

[22] *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

[23] 17 U.S.C. §507(b); *Roley v. New World Pictures, Ltd.*, 19 F.3d 479 (9th Cir. 1994).

[24] *Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

[25] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 344-45 (1991).

[26] *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994).

[27] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003).

source, or were a product of independent creation.[28] A judge may decide that the similarities only exist at the level of ideas,[29] or may be deemed such common expressions of an idea as to be stock "scenes a faire"[30] or merged with the idea itself (i.e., the "merger doctrine").[31] The similarities may be held as "random" instead of patterned.[32] And even if the ideas are original, expressive, protectable, and attributable to copying from the plaintiff's work, the copying may be considered fair use,[33] de minimis,[34] or otherwise non-actionable.[35]

Thus, copyright claims are rigorously analyzed, and routinely lost by plaintiffs.[36] Diminishing or curtailing the laches defense would not materially change the viability of copyright claims. To assert that the absence of laches from a defendant's arsenal will unfairly decrease the burden upon plaintiffs

---

[28] *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

[29] *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994).

[30] *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

[31] *Satava v. Lowry*, 323 F.3d 805, 812, fn. 5 (9th Cir. 2003).

[32] *Metcalf v. Bochco*, 294 F.3d 1069, 1074-75 (9th Cir. 2002).

[33] 17 U.S.C. §107.

[34] *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003).

[35] 17 U.S.C. §§108-122 (providing a variety of statutory exceptions and licenses).

[36] *See* footnotes 37 and 43, *infra.*

simply cannot be squared with the reality of modern copyright litigation, one where not a single film or television studio in the Ninth Circuit has been held liable for copyright infringement in over twenty years.[37]

---

[37] *Gregory v. Murphy*, 1991 U.S. App. LEXIS 4893 (9th Cir. 1991) (summary judgment for defendant affirmed) ("Coming to America"); *Shaw v. Lindheim*, 809 F.Supp. 1393 (C.D. Cal. 1992) (upon remand, judgment as a matter of law for defendant) ("The Equalizer"); *Pelt v. CBS, Inc*., 1993 U.S. Dist. LEXIS 20464 (C.D. Cal. 1993) (summary judgment for defendant) ("Listen Up! Young Voices for Change"); *Kouf v. Walt Disney Pictures and Television*, 16 F.3d 1042 (9th Cir. 1994) (summary judgment for defendant) ("Honey, I Shrunk the Kids"); *Lane v. Universal City Studios*, 1994 U.S. App. LEXIS 23769 (9th Cir. 1994) (summary judgment for defendant) ("Kojak: Fatal Flaw"); *Ostrowski v. Creative Artists Agency*, 1994 U.S. App. LEXIS 23732 (9th Cir. 1994) (summary judgment for defendant) ("To Forget Palermo"); *Kodadek v. MTV Networks*, 1996 U.S. Dist. LEXIS 20776 (C.D. Cal. 1996) (summary judgment for defendant) ("Beavis & Butt-head"); *Weygand v. CBS*, 1997 U.S. Dist. LEXIS 19613 (C.D. Cal. 1997) (summary judgment for defendant) ("Charlie"); *Laskay v. New Line Cinema*, 1998 U.S. App. LEXIS 23461 (C.D. Cal. 1998) (summary judgment for defendant) ("Don Juan DeMarco"); *Grosso v. Miramax Film Corporation*, 2001 U.S. Dist. LEXIS 26199 (C.D. Cal. 2001) (summary judgment for defendant) ("Rounders"); *Idema v. Dreamworks, Inc*., 162 F.Supp.2d 1129 (C.D. Cal. 2001) (summary judgment for defendant) ("The Peacemaker"); *Rice v. Fox Broadcasting Company*, 330 F.3d 1170 (9th Cir. 2003) (summary judgment for defendant) ("The Mystery Magician"); *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002) (jury verdict for defendant), aff'd, *Metcalf v. Bochco*, 200 Fed. Appx. 635 (9th Cir. 2006) ("City of Angels"); *Flynn v. Surnow*, 2003 U.S. Dist. LEXIS 26973 (C.D. Cal. 2003) (summary judgment for defendant) ("24"); *Bethea v. Burnett*, 2005 WL 1720631 (C.D. Cal. 2005) (summary judgment for defendant) ("The Apprentice"); *Merrill v. Paramount Pictures Corporation*, 2005 U.S. Dist. LEXIS 45401 (C.D. Cal. 2005) (summary judgment for

(Continued on following page)

---

defendant) ("Crossroads"); *Stewart v. Wachowski*, 574 F.Supp.2d 1074 (C.D. Cal. 2005) (summary judgment for defendant) ("The Matrix"); *Funky Films v. Time Warner Entertainment*, 462 F.3d 1072 (9th Cir. 2006) (summary judgment for defendant) ("Six Feet Under"); *Benjamin v. Walt Disney Company*, 2007 U.S. Dist. LEXIS 91710 (C.D. Cal. 2007) (summary judgment for defendant) ("Sweet Home Alabama"); *Lassiter v. Twentieth Century Fox Film Corporation*, 238 Fed. Appx. 194 (9th Cir. 2007) (summary judgment for defendant) ("Drumline"); *Zella v. E. W. Scripps Company*, 529 F.Supp.2d 1124 (C.D. Cal. 2007) (dismissal for defendant) ("Rachael Ray"); *Mestre v. Vivendi Universal U.S. Holding Co.*, 273 Fed. Appx. 631 (9th Cir. 2008) (summary judgment for defendant) ("Billy Elliot"); *Milano v. NBC Universal, Inc.*, 584 F.Supp.2d 1288 (C.D. Cal. 2008) (summary judgment for defendant) ("The Biggest Loser"); *Rosenfeld v. Twentieth Century Fox Film*, 2009 U.S. Dist. LEXIS 9305 (C.D. Cal. 2009) (summary judgment for defendant) ("Robots"); *Thomas v. Walt Disney Company*, 337 Fed. Appx. 694 (9th Cir. 2009) (dismissal for defendant) ("Finding Nemo"); *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620 (9th Cir. 2010) (summary judgment for defendant) ("The Last Samurai"); *Buggs v. Dreamworks, Inc.*, 2010 U.S. Dist. LEXIS 141515 (C.D. Cal. 2010) (summary judgment for defendant) ("Flushed Away"); *Clements v. Screen Gems, Inc.*, 2010 U.S. Dist. LEXIS 132186 (C.D. Cal. 2010) (summary judgment for defendant) ("Stomp the Yard"); *Gable v. National Broadcasting Co.*, 727 F.Supp.2d 815 (C.D. Cal. 2010) (summary judgment for defendant) ("My Name Is Earl"); *Gilbert v. New Line Productions*, 2010 U.S. Dist. LEXIS 27134 (C.D. Cal. 2010) (summary judgment for defendant) ("Monster in Law"); *Novak v. Warner Bros. Pictures, LLC*, 387 Fed. Appx. 747 (9th Cir. 2010) (summary judgment for defendant) ("We Are Marshall"); *Walker v. Viacom International, Inc.*, 2010 U.S. App. LEXIS 1475 (9th Cir. 2010) (summary judgment for defendant) ("SpongeBob SquarePants"); *Goldberg v. Cameron*, 787 F.Supp.2d 1013, 2011 U.S. Dist. LEXIS 36840 (N.D. Cal. 2011) (summary judgment for defendant) ("Terminator" franchise); *DuckHole Inc. v. NBC Universal Media LLLC*, 2013 U.S. Dist. LEXIS 157305, (C.D. Cal. 2013) (dismissal for defendant) ("Animal Practice"); *Quirk v. Sony Pictures Entm't*

(Continued on following page)

So successful are defendants with all of the other defenses available that they don't even need laches to prevail.[38]

B. Plaintiffs Often Gain Little and Lose Much by Delay

As noted by Petitioner, the plaintiff in a copyright suit bears the burden of proof by preponderance of the evidence,[39] and her obligation is to build a *prima facie* case in the manner discussed above. Any loss of evidence due to the passage of time generally works to the disadvantage of the party with the burden of proof.

For example, proving that a defendant had circumstantial access to a plaintiff's work often requires witnesses who can attest to either delivery or receipt of the work.[40] As time passes, witnesses to the foregoing may pass away or become difficult to locate, and memories naturally fade over time. These

---

Inc., 2013 U.S. Dist. LEXIS 47954 (N.D. Cal. 2013) (summary judgment for defendant) ("Premium Rush"); *Wild v. NBC Universal, Inc.*, 2013 U.S. App. LEXIS 4169 (9th Cir. 2013) (summary judgment for defendant) ("Heroes").

[38] *See, e.g.*, *Stewart v. Wachowski*, 574 F.Supp.2d 1074 (C.D. Cal. 2005) (granting summary judgment to a studio defendant after having denied laches in an earlier proceeding); *Goldberg v. Cameron*, 787 F.Supp.2d 1013 (N.D. Cal. 2011) (same).

[39] Petr. Br. 54.

[40] *Kamar International, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981).

evidentiary problems will generally benefit the *defendants*, who may refute the allegation of access by showing that the chain of events calls for speculation or conjecture. Thus, it is in every plaintiff's best interest to bring infringement claims as expeditiously as possible, lest critical evidence decay or disappear entirely.

It has been suggested that barring the equitable defense of laches in copyright will encourage plaintiffs to "lie in wait" in order to first determine that a project is successful. However, this argument is entirely antithetical to the business reality of the entertainment industry. For example, a film usually generates the most revenue in the weeks and months immediately following its release, since this is when the film is at the peak of its availability, marketing, and public awareness. Consequently, a plaintiff can readily assess the value of a lawsuit and seek redress for a claim well within the Copyright Act's three-year statute of limitations.

In short, the rule of diminishing returns is a primary concern in the world of delayed copyright infringement lawsuits. Quite apart from laches, plaintiffs have plenty of incentives not to sleep on their rights.

C. Empirical Data Do Not Show Need For Laches

Petitioner's Brief notes that six federal circuits have considered whether and when the doctrine of

laches may apply to copyright claims.[41] Five of those six federal circuits apply laches, if at all, in far fewer scenarios than the Ninth Circuit.[42] If there were any validity to the fear that a more restrictive application of laches would lead to an onslaught of untimely copyright claims, Amicus must ask: where is the flood?

According to LexisNexis, federal courts have only mentioned "copyright" and "laches" in the same paragraph 425 times since 1957, when the Copyright Act's uniform statute of limitations was first implemented. For perspective, removing "laches" from the search yields 31,349 results. Thus, laches is discussed in only one per cent of all copyright-infringement cases. The majority of these cases hail from the Second Circuit (123 mentions) and Ninth Circuit (96 mentions), both jurisdictions in which film and television studios have prevailed in virtually all copyright infringement suits brought against them for over twenty years.[43] This is true notwithstanding the fact

---

[41] Pet. 15-24.

[42] *Id.*

[43] *See* footnote 37, *supra* (listing 9th Circuit cases); *Novak v. National Broadcasting Company*, 752 F.Supp. 164 (S.D.N.Y. 1990) (summary judgment for defendant) ("Saturday Night Live"); *Kretschmer v. Warner Bros.*, 1994 U.S. Dist. LEXIS 7805 (S.D.N.Y. 1994) (summary judgment for defendant) ("Defending Your Life"); *Arden v. Columbia Pictures Industries*, 908 F.Supp. 1248 (S.D.N.Y. 1995) (summary judgment for defendant) ("Groundhog Day"); *Historical Truth Productions v. Sony Pictures Entertainment*, 1995 U.S. Dist. LEXIS 17477 (S.D.N.Y. 1995) (summary judgment for defendant) ("Universal Soldier");

(Continued on following page)

Robinson v. Viacom International, 1995 U.S. Dist. LEXIS 9781 (S.D.N.Y. 1995) (summary judgment for defendant) ("Hi Honey"); *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996) (summary judgment for defendant) ("Jurassic Park"); *Cox v. Abrams*, 1997 U.S. Dist. LEXIS 6687 (S.D.N.Y. 1997) (summary judgment for defendant) ("Regarding Henry"); *Burns v. Imagine Films Entertainment, Inc.*, 2001 U.S. Dist. LEXIS 24653 (W.D.N.Y. 2001) (summary judgment for defendant) ("Backdraft"); *Willis v. HBO*, 2001 U.S. Dist. LEXIS 17887 (S.D.N.Y. 2001) (summary judgment for defendant) ("Arli$$"); *Hudson v. Universal Pictures Corporation*, 2004 U.S. Dist. LEXIS 11508 (E.D.N.Y. 2004) (summary judgment for defendant) ("Life"); *Mowry v. Viacom International, Inc.*, 2005 U.S. Dist. LEXIS 15189 (S.D.N.Y. 2005) (summary judgment for defendant) ("The Truman Show"); *Brown v. Perdue*, 177 Fed. Appx. 121 (2d Cir. 2006) (summary judgment for defendant) ("The Da Vinci Code"); *Bunick v. UPN*, 2008 U.S. Dist. LEXIS 35536 (S.D.N.Y. 2008) (summary judgment for defendant) ("South Beach"); *Rodriguez v. Heidi Klum Company, LLC,* 2008 U.S. Dist. LEXIS 80805 (S.D.N.Y. 2008) (summary judgment for defendant) ("Project Runway"); *Blakeman v. Walt Disney Company*, 613 F.Supp.2d 288 (E.D.N.Y. 2009) (summary judgment for defendant) ("Swing Vote"); *Flaherty v. Filardi*, 2009 U.S. Dist. LEXIS 22641 (S.D.N.Y. 2009) (summary judgment for defendant) ("Bringing Down the House"); *Mallery v. NBC Universal, Inc.*, 331 Fed. Appx. 821 (2d Cir. 2009) (summary judgment for defendant) ("Heroes"); *The Sheldon Abend Revocable Trust v. Steven Spielberg*, 748 F.Supp.2d 200 (S.D.N.Y. 2010) (summary judgment for defendants) ("Disturbia"); *Cabell v. Sony Pictures Entm't, Inc.*, 425 Fed. Appx. 42 (2d Cir. N.Y. 2011) (summary judgment for defendant) ("You Don't Mess with the Zohan"); *Muller v. Twentieth Century Fox Film Corp.*, 794 F.Supp.2d 429 (S.D.N.Y. 2011) ("Alien vs. Predator"); *Alexander v. Murdoch*, 502 Fed. Appx. 107 (2d Cir. N.Y. 2012) ("Modern Family"); *Effie Film, LLC v. Pomerance*, 909 F.Supp.2d 273, 312 (S.D.N.Y. 2012) (judgment on the pleadings for defendant) ("Effie"); *Latimore v. NBC Universal TV Studio*, 480 Fed. Appx. 649 (2d Cir. 2012) (dismissal for defendant) ("The Biggest Loser"); *Mena v. Fox Entm't Group*, 2012 U.S. Dist. LEXIS 143964 (S.D.N.Y. 2012) (dismissal

(Continued on following page)

that the Second Circuit applies the laches doctrine in far more limited circumstances than the Ninth.[44] Thus, the availability of laches appears to have no significant impact on the frequency with which copyright cases are filed, nor on their ultimate outcomes.

As noted by this Court, a "parade of horribles" is only as strong an argument as the probability that the parade will in fact materialize. *Harmelin v. Michigan*, 501 U.S. 957, 986 n. 11 (1991). Respondents have not so carried their burden; indeed, they have presented no evidence whatsoever to indicate that denying the applicability of laches to copyright claimants will lead to anything other than application of the Copyright Act's statute of limitations. Despite the current copyright landscape yielding a slew of laches standards, not one Circuit appears to have yielded an aberrant number of cases grappling with the defense. If there is no parade of horribles now, it seems unlikely that there will ever be.

for defendant) ("Past Life"); *Webb v. Stallone*, 910 F.Supp.2d 681 (S.D.N.Y. 2012) (summary judgment for defendant) ("The Expendables"); *Hallford v. Fox Entm't Group, Inc.*, 2013 U.S. Dist. LEXIS 19625 (S.D.N.Y. 2013) (dismissal for defendant) ("Touch").

[44] Pet. 17.

CONCLUSION

Copyright litigation is already filled with a great number of obstacles for plaintiffs to overcome, and application of laches in addition to the three-year statute of limitations spelled out in the Copyright Act is an unnecessary additional burden. Without any logical or empirical evidence for the notion that curtailing laches will encourage plaintiffs to "sleep on their rights" or "lie in wait," the fear of an onslaught of stale copyright claims is baseless. Any such danger would have manifested long ago, given the spectrum of the current circuit split. This only reinforces how unnecessary the doctrine of laches is to a functioning system of copyright law.

Respectfully submitted,

STEVEN W. SMYRSKI
Counsel of Record
SMYRSKI LAW GROUP, A P.C.
3310 Airport Ave., SW
Santa Monica, CA 90405
(310) 397-9118
steve@smyrski.com

STEVEN T. LOWE
DANIEL B. LIFSCHITZ
LOWE & ASSOCIATES
11400 Olympic Blvd.
Suite 640
Los Angeles, CA 90064
(310) 477-5811

Counsel for Amicus Curiae