

NO. 12-1315

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IN THE  
SUPREME COURT OF THE  
UNITED STATES

PAULA PETRELLA,

*Petitioner,*

*v.*

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

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF OF AMICUS CURIAE  
NEW ENGLAND LEGAL FOUNDATION IN  
SUPPORT OF RESPONDENTS**

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## INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (“NELF”) seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the equitable defense of laches should be available to bar a claim of copyright infringement that first accrued *18* years before the plaintiff filed suit, and reacquired repeatedly thereafter, when the plaintiff knew about her claim from the outset, and her unreasonable delay has prejudiced the defendant.<sup>1</sup>

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF’s mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF’s members and supporters include both large and small businesses located primarily in the New England region.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that, on October 4, 2013, and on October 9, 2013, counsel of record for the petitioner and counsel of record for the respondents filed respectively with this Court a blanket consent to the filing of amicus briefs, in support of either or neither party.

NELF is committed to a balanced interpretation of federal statutes, such as the Copyright Act, that affect the potentially competing property rights and economic interests of individuals and businesses. For this reason, NELF strongly supports the ability of the courts to use their inherent equitable powers in cases of continuous copyright infringement, such as this one, in which a “rolling” statute of limitations allows the plaintiff to litigate stale claims. In such cases, the defense of laches is necessary to prevent the plaintiff from abusing this rolling limitations period and hence the judicial process. Recognition of the laches defense allows a court to fulfill the thwarted purpose of the statute of limitations in such cases: to protect the defendant from having to litigate stale claims.

NELF has filed a number of other amicus briefs in recent cases before this Court that address issues of statutory interpretation affecting businesses.<sup>2</sup>

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<sup>2</sup> See, e.g., *Atlantic Marine Constr. Co. v. United States Dist. Ct. for the Western Dist. of Tex.*, 134 S. Ct. 568 (2013) (forum selection clause designating particular federal judicial district generally enforceable, in motion to transfer venue under 28 U.S.C. § 1404(a)); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (standard of but-for causation, and not mixed-motive liability, applies to Title VII retaliation claims); *Vance v. Ball State*, 133 S. Ct. 2434 (2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (absent contrary congressional command, Federal Arbitration Act requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts state law effectively requiring class

NELF believes that its brief in this case will assist this Court in deciding the important issue of whether laches should be available to prevent the plaintiff from abusing a rolling limitations period in circumstances like those presented here.

### SUMMARY OF ARGUMENT

The laches defense is a crucial equitable safeguard in a case of continuous copyright infringement, such as this one, where the plaintiff has an indefinite right to sue on the same recurring claim of copyright infringement. In such a case, the plaintiff has been on notice of her claim from the outset but has delayed filing suit for many years, thereby allowing the defendant to continue exploiting the same allegedly infringing work. But the statute of limitations cannot bar the plaintiff's stale claim, because many lower federal courts have held that a new claim accrues with each new act of infringement. Thus, the plaintiff has a "rolling," three-year right to sue on the same recurring claim of copyright infringement.

Laches is a necessary defense in such a case to prevent the plaintiff from abusing this rolling limitations period, to the evidentiary and economic detriment of the defendant. Without the laches defense, the plaintiff can stand by and allow the same claim of copyright infringement to reaccrue repeatedly over a long period of time. And with each

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arbitration as condition of enforcing consumer arbitration agreements). *See also Lawson v. FMR LLC, cert. granted*, 133 S. Ct. 2387 (May 20, 2013) (No. 12–3) (issue whether Sarbanes-Oxley Act's whistleblower provision protects employees of private companies that contract with publicly held companies).



foreseeable recurrence of the same claim, the plaintiff's potential share of the defendant's profits accumulates. She is thus free to delay filing suit indefinitely and strategically on a claim that first accrued many years before the limitations period, which is generally when the defendant created and first exploited the work.

This Court has, in effect, already decided the issue in this case in the respondents' favor: laches is available to prevent a plaintiff from abusing a rolling limitations period by delaying unreasonably in filing her otherwise timely claim, and thereby causing the defendant evidentiary harm. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In *Morgan*, as in this case, the federal statutory claim continues to accrue under the applicable statute of limitations with each repeated and related act of the defendant. Thus, the plaintiff in each case has a virtually indefinite right of action in the same ongoing claim, allowing the plaintiff to delay filing suit. When such a plaintiff does eventually decide to sue, it is therefore likely that the claim will have arisen from facts occurring long before the applicable limitations period, and that the plaintiff will have long been aware of those ancient operative facts. As a result, the plaintiff's unreasonable delay will have caused the loss of evidence that is essential to the defendant's case. Therefore, laches becomes necessary to prevent irreparable evidentiary harm to the defendant in claims that are subject to a rolling limitations period.

The evidentiary prejudice identified in *Morgan* is even more pronounced in cases of ongoing

copyright infringement, because the statutory term of the plaintiff's copyright is often quite long. As in this case, the evidence necessary to defend the infringement claim would have arisen from facts and events that occurred long ago, when the defendant created the allegedly infringing work. And, as in this case, the defendant's key evidence could be irretrievably lost, due to the plaintiff's permissible delay under a rolling limitations period. Witnesses who are necessary for defending the claim may die or otherwise become unavailable, and memories may fade. The longer the plaintiff delays filing suit after her claim first accrues, the more likely the defendant will suffer irreparable evidentiary harm, as this case pointedly illustrates.

A long-delayed claim of copyright infringement is also likely to inflict economic harm on the defendant. Without the laches defense, the plaintiff is free to lie in wait for several years while the defendant invests substantial capital to exploit what it believes in good faith to be its *own* original work to exploit. And then, when the defendant's money and efforts have borne fruit and have thus made a lawsuit worth the plaintiff's while, she can choose to sue and seek recovery of her share of three years' worth of the defendant's highest profits.

Without the laches defense, then, the plaintiff in a case of continuous copyright infringement could abuse the rolling limitations period without any judicial oversight. Recognition of the laches defense in such cases is therefore necessary to fulfill the gatekeeping function of a statute of limitations: to

protect the defendant from having to defend a stale claim.

## ARGUMENT

**I. LACHES SHOULD BE AVAILABLE IN A CASE OF CONTINUOUS COPYRIGHT INFRINGEMENT TO BAR A CLAIM THAT FIRST ACCRUED 18 YEARS BEFORE THE PLAINTIFF FILED SUIT, WHERE THE PLAINTIFF'S UNREASONABLE DELAY HAS CAUSED THE DEFENDANT EVIDENTIARY AND ECONOMIC HARM.**

At issue in this case is whether a federal court may apply the equitable doctrine of laches to bar a plaintiff from delaying for *18* years before filing suit on a claim of copyright infringement, resulting in economic and evidentiary harm to the defendant. It is undisputed that the petitioner, Paula Petrella, knew about her claim of potential copyright infringement from its inception, in 1991, but that she did not file suit until 2009. *See* Respondents' Brief ("Resp. Br.") 2-3.<sup>3</sup> Moreover, the petitioner

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<sup>3</sup> In particular, in 1991, the petitioner, aware of this Court's decision in *Stewart v. Abend*, 495 U.S. 207 (1990), perfected her inherited renewal rights in her late father's copyright in a 1963 screenplay about the former boxer Jake LaMotta. *See* Resp. Br. 2. Respondents had allegedly used this 1963 screenplay, with Mr. Petrella's permission, as source material for the 1980 film *Raging Bull*. *See id.* at 1. However, due to Mr. Petrella's death in 1981, ten years before the start of the renewal period in the screenplay, the renewal rights reverted to his statutory heirs, including the petitioner, in 1991. *See id.* at 2. Thus, as of 1991, the petitioner knew that *Raging Bull* allegedly infringed her inherited copyright in the 1963 screenplay.

waited so long to file suit primarily because the respondents' allegedly infringing work, the 1980 film *Raging Bull*, had not yielded a profit for many years. See Resp. Br. at 3.

**A. In A Case of Continuous Copyright Infringement, The Plaintiff Can Delay Filing Suit Indefinitely Because She Has A “Rolling,” Three-Year Right Of Action In The Same Recurring Claim Each Time The Defendant Exploits The Same Disputed Work.**

The laches defense is a crucial equitable safeguard in a case of continuous copyright infringement, such as this one, where the plaintiff has an indefinite right to sue on the same recurring claim of copyright infringement. In such a case, the plaintiff has long been on notice of her claim, because the defendant has been repeatedly and openly exploiting the *same* disputed work for many years. When the plaintiff eventually does choose to sue, however, the applicable statute of limitations<sup>4</sup> cannot bar her stale claim. This is so because, according to many lower federal courts, “each new infringing act causes a *new* claim to accrue . . . .” *Seven Arts Filmed Entertainment Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (emphasis added). See also *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009) (holding same); *Bridgeport Music, Inc. v.*

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<sup>4</sup> “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).

*Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (same); *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir. 1992) (same). Thus, “in a case of continuing copyright infringements, an action may be brought for all acts that accrued within the three years preceding the filing of suit.” *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994). See also *William A. Graham Co. v. Haughey*, 568 F.3d at 433 (holding same); *Bridgeport Music*, 376 F.3d at 621 (same); *Stone v. Williams*, 970 F.2d at 1049-50 (same).

As a result, the plaintiff in a case such as this one has a “rolling,” three-year right to sue on the *same* recurring claim of copyright infringement each time the defendant exploits the same disputed work. The plaintiff is therefore free to abuse this rolling limitations period by filing suit many years after the first accrual of that claim, which is generally when the defendant created and first exploited the disputed work. See *William A. Graham Co. v. Haughey*, 646 F.3d 138, 141, 150-51 (3d Cir. 2011) (copyright infringement claim first accrued when defendant first used insurance coverage proposals, derived from former employer’s insurance materials, in presentation to clients).<sup>5</sup>

In a case of ongoing copyright infringement such as this one, then, the plaintiff has only *one*

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<sup>5</sup> In this *Abend* case, of course, the claim did not first accrue when the respondents first released *Raging Bull* in 1980. Instead, the film “became” a potentially infringing work in 1991, when the petitioner perfected her renewal rights in the 1963 screenplay that allegedly served as source material for the film. See n.3, above.

underlying, recurring claim of infringement. While the defendant's particular acts of exploiting its allegedly infringing work may differ over time--such as by first releasing a film for its theatrical run and later by selling copies of that same film in DVD or Blu-ray format--the *content* of the defendant's work remains unchanged. If there are indeed any elements of the defendant's work that infringe the plaintiff's copyright in a preexisting work, then the defendant's repeated commercial exploitation of its fixed work (in different formats that do not alter its content) merely reproduces these same infringing elements. Therefore, each new act of the defendant raises the same claim of copyright infringement because it implicates the *same* allegedly infringing elements that are contained in the defendant's work. After all, a claim for copyright infringement focuses on whether the defendant's work has copied "constituent elements of the [plaintiff's] work that are original." *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

In this light, then, the different ways in which the defendant may exploit its work over time are really just repeated instances of the same, recurring claim of copyright infringement:

Where, as here, the allegedly infringing aspect of the DVD [of the disputed movie] is identical to the alleged infringements contained in the underlying movie [itself], then the two should be treated *identically* for purposes of laches. . . . [T]he perfect overlap between the alleged

infringements in the DVD re-releases and the original movies requires us *to treat them the same for purposes of laches, regardless of the statute of limitations.*

*Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 953-54 (9th Cir. 2001) (laches barred long-delayed claim that certain of defendants' James Bond films, released in different formats over several decades, infringed plaintiff's copyright in prior written works) (emphasis added).

An infringement claim is thus a one-time-only determination that includes a comparison of the defendant's work with the plaintiff's work, to determine whether the defendant has copied substantial, protectable portions of the plaintiff's work. *See Hamil Am., Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999) (discussing same). As in this case, the claim can also include other factual disputes connected with the work's creation, such as authorship of the work, ownership of the copyright in the work, and independent origination of the work. *See, e.g., Seven Arts Filmed Entertainment v. Content Media Corp.*, 733 F.3d at 1252-53 (co-ownership dispute in copyright case); *Danjaq*, 263 F.3d at 956 (defense of independent origination); *Zuill v. Shanahan*, 80 F.3d 1366, 1369 (9th Cir. 1996) (co-authorship dispute in copyright case). *See also* Resp. Br. 51-52.

All of these potential factual disputes arise as soon as the defendant has created the allegedly infringing work. And the outcome of these factual

issues will not change each time the defendant exploits the *same* fixed work in a different way. “[T]he feared future infringements are identical to the alleged past infringements. . . . [E]ach of the objectionable [exploiting acts]--past, present, and future--infringes upon [the plaintiff’s] rights in the same way, stemming from the *same claimed original sin*” of unlawful copying from the plaintiff’s preexisting work. *Danjaq*, 263 F.3d at 960 (emphasis added).

In point of fact, then, the defendant’s repeated exploitation of its unchanging work, in different formats, does not raise any new claims of copyright infringement. Instead, the defendant’s repeated acts are probative only of the *profits* that accumulate each time the plaintiff allows her single claim of copyright infringement to reaccrue. For this reason, laches should be available to prevent a plaintiff from abusing a rolling limitations period “to speculate without risk with the [defendant’s] money . . . .” *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (D.C.N.Y. 1916) (Hand, J.).

Thus, in a case of continuous copyright infringement such as this one, the plaintiff’s “new” claim that accrues with each infringing act is really just the repeated accrual of the same claim, which first accrued several years before the limitations period began. And a rolling statute of limitations cannot bar this stale claim. Instead, it merely bars the plaintiff from recovering on acts that occurred more than three years before she filed suit. See *Roley v. New World Pictures*, 19 F.3d at 481. The defendant must still defend this ancient claim,



because each “timely” act of the defendant implicates the same old claim. And the plaintiff’s undue delay is likely to have handicapped or even defeated the defendant’s case, by causing the irretrievable loss of essential evidence. The plaintiff’s impassivity for many years is also likely to have caused the defendant to invest substantial capital in exploiting the work, under the defendant’s reasonable assumption that it had every right to do so.

Recognition of the laches defense would allow a court to prevent a plaintiff from abusing a rolling limitations period under the circumstances of this case, to the defendant’s evidentiary and economic detriment. A court applying the laches doctrine could look past the “separate accrual” of each claim in a case of continuous copyright infringement and instead treat all of these related acts as instances of the same, ancient claim of copyright infringement.

Without the laches defense, then, a plaintiff suing on a claim that is subject to a rolling limitations period can defeat the basic purpose of the statute of limitations--to protect the defendant from having to litigate a stale claim. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (“Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights . . .”). Recognition of the laches defense would allow a court to protect a defendant from evidentiary and economic harm, thereby fulfilling the thwarted purpose of the statute of limitations in a case like this one.

**B. Under *National Railroad Passenger Corporation v. Morgan*, Laches Is Available To Prevent A Plaintiff From Abusing A Rolling Limitations Period By Delaying Unreasonably In Filing Her Otherwise Timely Claim, And Thereby Causing The Defendant Evidentiary Harm.**

This Court has, in effect, already decided the issue in this case in the respondents' favor: laches is available to prevent a plaintiff from abusing a rolling limitations period by delaying unreasonably in filing her otherwise timely claim, and thereby causing the defendant evidentiary harm. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002)("[A]n employer [defending a Title VII hostile work environment claim] may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant."). *Morgan* is on all fours with this case and therefore warrants a close reading.

The Court in *Morgan* explained that laches is available in Title VII hostile work environment claims because, as in this case, the same claim *continues to accrue* under the applicable statute of limitations with each repeated and related act of the defendant. *See Morgan*, 536 U.S. at 117-18, 121-22. Stated more precisely, the Court held that a hostile work environment constitutes one claim that continues to accrue with each new, related act of the harassing employee. *See id.*, 536 U.S. at 117-18. Similarly, in a case of continuous copyright infringement, there is one underlying claim that

continues to *reaccrue* with each new exploiting act of the defendant in the same disputed work.

In both hostile work environment and continuous copyright cases, the plaintiff is likely to know that the defendant has been engaging repeatedly in the same kind of conduct over a long period of time. *See Morgan*, 536 U.S. at 115, 118. Each case involves an ongoing and open pattern of conduct, which the plaintiff may *allow* to continue by remaining inactive under a rolling limitations period. *See id.*, 536 U.S. at 115, 117, 121. This is because each new act of the defendant, however foreseeable or repetitive it may be, gives the plaintiff a new right of action in the same old claim. *See id.* at 117. Thus, the rolling statute of limitations applicable in each case permits the plaintiff to delay filing suit with impunity, while the defendant continues to engage in the same, foreseeable pattern of conduct. *See id.*, 536 U.S. at 117-18, 121.

In short, the plaintiff in each case has a virtually *indefinite* right of action in the same ongoing claim, allowing the plaintiff to delay filing suit. When such a plaintiff does eventually decide to sue, it is therefore likely that the claim will have arisen from facts that occurred long before the applicable limitations period, and that the plaintiff will have long been aware of those ancient operative facts. *See Morgan*, 536 U.S. at 115, 117-18, 121.<sup>6</sup>

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<sup>6</sup> As amicus has discussed above, a claim for copyright infringement first accrues generally when the defendant creates and first exploits the disputed work. However, in *Abend* claims, such as this one, the claim first accrues when the

As a result, the defendant in each case may be “significantly handicapped in making his defense . . . .” *Morgan*, 536 U.S. at 121. That is, the plaintiff’s abuse of a rolling limitations period in each case could cause the loss of evidence that is essential to the defendant’s case. *See id.* The defendant could therefore be prejudiced by having to defend a claim that is no longer defensible, due to the plaintiff’s unreasonable delay. *See id.* Therefore, laches becomes necessary to prevent such evidentiary harm to the defendant in claims that are subject to a rolling limitations period. “In such cases, the federal courts have the discretionary power to locate a just result in light of the circumstances peculiar to the case.” *Id.*, 536 U.S. at 121 (citation and internal quotation marks omitted).

In sum, *Morgan* establishes that laches is an essential defense in claims like this one, to prevent the plaintiff from abusing her virtually unlimited right of action in the same, continuously accruing claim. *Morgan* recognizes that a rolling limitations period allows the plaintiff to delay unreasonably in filing suit, and that such delay could cause the defendant grave evidentiary harm. *Morgan* therefore empowers a court to bar an otherwise timely claim under the laches doctrine, to protect the defendant from evidentiary prejudice and to prevent the plaintiff from abusing a rolling limitations period.

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plaintiff perfects her renewal rights in the allegedly infringed work.

**C. Laches Is Necessary To Prevent A Copyright Plaintiff From Abusing A Rolling Limitations Period And Thereby Causing The Defendant Evidentiary And Economic Harm.**

The evidentiary prejudice identified in *Morgan* is even more pronounced in cases of ongoing copyright infringement, because the statutory term of the plaintiff's copyright is often quite long.<sup>7</sup> As in this case, the evidence necessary to defend the infringement claim would have arisen from facts and events that occurred many years ago, when the defendant created the allegedly infringing work. And, as in this case, the defendant's key evidence could be irretrievably lost, due to the plaintiff's permissible delay under a rolling limitations period. Witnesses who are necessary for defending the claim may die or otherwise become unavailable, and memories may fade.<sup>8</sup> "[T]he passage of time has

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<sup>7</sup> For example, the renewal copyright term for works, such as the 1963 screenplay at issue in this case, that are created and registered before January 1, 1978 is 67 years. 17 U.S.C. § 304(a)(1)(B)(i). For works created on or after January 1, 1978, the copyright term is even more generous and subsists generally for the *life* of the author, plus an additional 70 years. 17 U.S.C. § 302(a).

<sup>8</sup> As amicus has discussed above, a claim for copyright infringement is not limited to a comparative analysis of the plaintiff's and defendant's works. As this case clearly illustrates, live witness testimony would be necessary to prove such defenses as co-authorship of the plaintiff's work or lack of originality in the plaintiff's work, based on the disputed chronology of certain works at issue here. *See* Resp. Br. 51-52. *See also Danjaq*, 263 F.3d at 956 (defense of independent origination required live witness testimony, thereby

eroded memories or made witnesses or other evidence unavailable . . . .” *Stogner v. California*, 539 U.S. 607, 615 (2003).

The defendant in a case like this one is thus disadvantaged by a defense that remains fixed in time with the creation of the disputed work. The plaintiff, however, is free to stand by and let the same old claim reaccrue indefinitely with each repeated act of the defendant. The longer the plaintiff delays filing suit after her claim first accrues, the more likely the defendant will suffer irreparable evidentiary harm, as this case pointedly illustrates.

Quite apart from the evidentiary prejudice identified in *Morgan*, a long-delayed claim of copyright infringement is also likely to inflict economic harm on the defendant. Without the laches defense, the plaintiff is free to lie in wait for several years while the defendant invests substantial capital to exploit what it believes in good faith to be its *own* original work to exploit.<sup>9</sup> And then, when the defendant’s money and efforts have

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establishing evidentiary prejudice warranting application of laches).

<sup>9</sup> In this case, for example, one esteemed film critic has noted that *Raging Bull* is a highly ambitious and self-consciously *original* work that incorporates many diverse cinematic and cultural elements and transforms them into a unique whole: “[*Raging Bull*] is a biography of the prizefight *genre*; it’s also about movies and about violence, it’s about gritty visual rhythm, it’s about Brando, it’s about the two *Godfather* pictures-it’s about Scorsese and De Niro’s trying to *top what they’ve done and what everybody else has done*.” Pauline Kael, *5001 Nights at the Movies* 612 (1991) (emphasis added).

borne fruit and have thus made a lawsuit worth the plaintiff's while, she can choose to sue and seek recovery of her share of three years' worth of the defendant's profits.

Laches should therefore be available to prevent the plaintiff from biding her time strategically for years, all the while monitoring the defendant's progress in generating profits from its exploitation of the disputed work:

[I]t is 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. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.

*Haas v. Leo Feist*, 234 F. at 105.

Without the safeguard of a laches defense, then, a rolling limitations period "would permit plaintiffs who know of the defendant's pattern of activity simply to wait, sleeping on their rights, as the pattern continues and . . . damages accumulate, perhaps bringing suit only long after the memories of witnesses have faded or evidence is lost . . . ." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting rule that civil RICO claim continues accruing until occurrence of last predicate act in

ongoing pattern of racketeering activity). In effect, the laches defense holds the plaintiff accountable for *allowing* the same ancient claim of copyright infringement to reaccrue repeatedly over a long period of time.

In sum, if the copyright defendant could not invoke the laches defense, the plaintiff in a case of continuous copyright infringement would be free to abuse the rolling limitations period without any judicial oversight. As this case shows, the plaintiff could allow the defendant to continue investing its capital in exploiting the disputed work for many years, and she could then sue for her share of the defendant's highest profits. At the same time, the plaintiff's strategically long delay will have impeded or even negated the defendant's ability to defend itself on a claim that first accrued long ago. Recognition of the laches defense in such cases is therefore necessary to fulfill the gatekeeping function of a statute of limitations: "to protect defendants against stale or unduly delayed claims." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (citation and internal quotation marks omitted).



## CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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