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## NOTE

# Rejecting *Auscape International v. National Geographic Society* for a Uniform Civil Copyright Lawsuit Discovery Rule of Accrual

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## INTRODUCTION

A writer creates a screenplay and ten years later mails an original copy to her friend who is a prominent film producer.<sup>1</sup> The writer hopes that her friend will produce the screenplay, but the friend declines. Unbeknownst to the writer, her friend immediately begins producing the screenplay. Three years pass, and the writer sees a film that her friend produced at a local video store. The writer discovers that the film's storyline is strikingly similar to her screenplay and confronts her friend who acknowledges the similarities, but insists that someone else's screenplay is the basis for the film. Disgruntled, the writer files a copyright infringement lawsuit against her friend and the production company one year later.

During litigation, both parties acknowledge that the Copyright Act does not explicitly indicate when a civil copyright lawsuit's statute of limitations begins accruing.<sup>2</sup> However, both parties disagree as to when the statute of limitations begins accruing.<sup>3</sup> The defense contends that under the injury accrual rule, the statute of limitations commenced when the movie first released.<sup>4</sup> The defendants consequently file a motion for summary judgment, insisting that the three-year statute of limitations has run.<sup>5</sup> The writer, however, argues that her claim is timely because the limitations period only began running from when she discovered the film at the store.<sup>6</sup> The court has little statutory or jurisprudential guidance to determine which rule applies and is at an impasse.<sup>7</sup>

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<sup>1</sup> This hypothetical is based on the facts of *Roley v. New World Pictures Ltd.*, 19 F.3d 479 (9th Cir. 1994).

<sup>2</sup> See generally John Ramirez, *Discovering Injury? The Confused State of the Statute of Limitations for Federal Copyright Infringement*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1128-29 (2007) (discussing Copyright Act's ambiguity in specifying particular accrual rule).

<sup>3</sup> See generally *TRW Inc. v. Andrews*, 534 U.S. 19, 25 (2001) (describing parties' desire for different accrual rules); *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at \*5 (S.D.N.Y. Mar. 29, 2002) (discussing parties' confusion regarding Copyright Act statute of limitations accrual rule).

<sup>4</sup> The injury accrual rule starts a statute of limitation immediately upon injury. See *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008).

<sup>5</sup> See *Roley*, 19 F.3d at 480.

<sup>6</sup> Statutes of limitations under the discovery accrual rule begin when the injury is discovered or should have been discovered. See *Crane Design, Inc. v. Pac. Coast Constr., LLC*, No. C05-251RSM, 2006 WL 692019, at \*4 (W.D. Wash. Mar. 17, 2006).

<sup>7</sup> Compare *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006) (applying injury accrual rule), and *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (same), with *Sapon*, 2002

The Copyright Act's statute of limitations provision is codified at 17 U.S.C. § 507 and fails to provide courts with clear guidance as to which accrual rule applies in civil actions.<sup>8</sup> The First, Third, Sixth, Seventh, and Ninth Circuit Courts of Appeals apply the discovery accrual rule.<sup>9</sup> However, several district courts in the Second Circuit have applied the injury accrual rule since the Supreme Court of the United States decided *TRW Inc. v. Andrews*.<sup>10</sup>

This Note argues that courts should apply the discovery rule of accrual in civil copyright infringement lawsuits. Part I reviews the history of accrual rules for civil copyright infringement lawsuits before and after Congress enacted the Copyright Act's statute of limitations provision.<sup>11</sup> Part I also highlights the confusion that *TRW* caused in the lower federal courts and circuit court cases construing the statute, including the Third Circuit's decision in *William A. Graham Co. v. Haughey*.<sup>12</sup> In *William A. Graham Co.*, the Third Circuit expressly rejected *Auscape International v. National Geographic Society's* analysis, which found *TRW* relevant to the accrual rule inquiry. Part II details the U.S. District Court for the Southern District of New York's decision in *Auscape International* that created a split of authority regarding the appropriate civil copyright accrual rule.<sup>13</sup> Part II's

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WL 485730, at \*5 (applying discovery accrual rule), and *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 640 (S.D.N.Y. 2000) (same).

<sup>8</sup> See 17 U.S.C. § 507 (2006) (providing statute of limitations periods for criminal and civil copyright violations); see also Copyright Act, 17 U.S.C. §§ 101-1332 (2006); sources cited *supra* note 7. See generally *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (defining federal injury accrual rule to be when injury first harms plaintiff).

<sup>9</sup> See, e.g., *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433, 437 (3d Cir. 2009) (applying discovery accrual rule); *Warren Freedendfeld Assocs. Inc. v. McTigue*, 531 F.3d 38, 44-46 (1st Cir. 2008) (same); *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 390 (6th Cir. 2007) (same); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 705-07 (9th Cir. 2004) (same); *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004) (same).

<sup>10</sup> *TRW*, 534 U.S. at 19; see, e.g., *Chivalry Film Prods.*, 2006 WL 89944, at \*1 (applying injury accrual rule); *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 247 (S.D.N.Y. 2004) (applying *TRW's* analysis and injury accrual rule); *Barksdale*, 211 F.R.D. at 245 (applying injury accrual rule).

<sup>11</sup> See *infra* Part I.A.

<sup>12</sup> *William A. Graham Co.*, 568 F.3d at 434 (finding that analysis in *TRW* does not apply to civil copyright infringement causes of action and using discovery accrual rule); *infra* Parts I.B, II.B. See generally *TRW*, 534 U.S. at 19 (interpreting FCRA accrual rule).

<sup>13</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 244, 247 (departing from Second Circuit district courts' practice of applying injury accrual rule to civil copyright infringement causes of action); *infra* Part II.

examination highlights how *Auscape International* applied analytical techniques from *TRW*.<sup>14</sup>

Part III argues that a canon of statutory construction and Supreme Court precedent require courts to interpret § 507(b) as containing a discovery accrual rule.<sup>15</sup> It then argues that applying the discovery accrual rule is consistent with the Copyright Act's legislative history.<sup>16</sup> Finally, Part III asserts that the injury accrual rule creates an undue burden on individuals and small businesses.<sup>17</sup> Such entities frequently do not have the resources necessary to monitor every possible infringement that could begin the limitations period running. If the Supreme Court reviews *Auscape International*, it should require courts to apply the discovery accrual rule in civil copyright infringement lawsuits.

### I. BACKGROUND

Statutes of limitations are fundamental components of all causes of action and determine how long a party has to institute a lawsuit.<sup>18</sup> Consequently, ambiguity regarding which accrual rule applies in civil copyright lawsuits not only generates confusion and uncertainty for filing parties, but also inefficiency within the court system.<sup>19</sup>

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<sup>14</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 244, 247 (refusing to continue Second Circuit district court trend of applying injury accrual rule to civil copyright violation lawsuits); *infra* Part II.

<sup>15</sup> See *infra* Part III.A. See generally 17 U.S.C. § 507(b) (2006) (codifying civil copyright infringement statute of limitations); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (asserting that statute's use of word "arose" means when plaintiff has cause of action that is both complete and present).

<sup>16</sup> See *infra* Part III.B. See generally 17 U.S.C. § 507 (2006) (codifying Copyright Act's statute of limitations provision); S. REP. NO. 85-1014 (1957) (discussing Congress's intent to provide standardized statute of limitations for all civil copyright lawsuits).

<sup>17</sup> See *infra* Part III.C.

<sup>18</sup> See *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (indicating that statute of limitations are not just formalities, but basic components of well-ordered judicial systems); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) (discussing how statute of limitations times may be arbitrary, but are nevertheless purposeful); *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003) (articulating purpose of statute of limitations).

<sup>19</sup> See, e.g., *William A. Graham Co. v. Haughey*, 568 F.3d 425, 434 (3d Cir. 2009) (discussing ambiguity in 17 U.S.C. § 507(b)'s use of word "accrued" and applying opposing rules of accrual to civil copyright infringement causes of action); *Auscape Int'l*, 409 F. Supp. 2d at 242-47 (debating which accrual rule applies to civil copyright violations); cf. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1127 (3d Cir. 1988) (questioning which accrual rule applies to civil Racketeer Influenced and Corrupt

Congress's failure to indicate when the limitations period begins to run under § 507(b) has exacerbated courts' uncertainty and confusion over when civil copyright causes of action accrue.<sup>20</sup>

A. *Statutes of Limitations Before 17 U.S.C. § 507(b)*

Congress enacted copyright laws to promote and encourage artistic creativity, passing the first Copyright Act in 1909 to afford authors of copyrighted material a cause of action against infringers.<sup>21</sup> Congress amended the Act in 1957 and instituted a three-year statute of limitations for criminal copyright causes of action.<sup>22</sup> The amendment did not mention any time-bars for civil copyright violations.<sup>23</sup>

Federal courts, therefore, developed a statute of limitations rule for civil copyright violations that applied the relevant limitations period from the state where the plaintiff filed suit, ranging from one to eight years.<sup>24</sup> For instance, the Fifth Circuit Court of Appeals applied

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Organizations Act). *See generally* Ramirez, *supra* note 2, at 1128-29 (discussing confusion surrounding 17 U.S.C. § 507's failure to indicate which accrual rule applies).

<sup>20</sup> *See* Ramirez, *supra* note 2, at 1128-29 (analyzing continued state of confusion surrounding civil copyright litigation accrual rule). *Compare Auscape Int'l*, 409 F. Supp. 2d at 242-47 (discussing ambiguity in 17 U.S.C. § 507(b)'s use of word "accrued" and applying injury accrual rule to civil copyright infringement causes of action), with *William A. Graham Co.*, 568 F.3d at 434 (discussing ambiguity in 17 U.S.C. § 507(b)'s use of word "accrued" and applying discovery accrual rule to civil copyright infringement causes of action). *See generally* U.S. CONST. art. I, § 8, cl. 8 (protecting individuals' intellectual property rights).

<sup>21</sup> *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 524-26 (1994) (articulating Congress's intent in passing Copyright Act was to promote artistic creativity); RICHARD WINCOR & IRVING MANDELL, COPYRIGHTS, PATENTS AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 7 (1980) (noting that Congress's intent in passing Copyright Act was to afford creators protections from others and to promote artistic creativity).

<sup>22</sup> *See* 17 U.S.C. § 507 (2006); S. REP. NO. 85-1014, at 1 (1957) (indicating Congress's desire to include subsection in § 507 covering civil copyright statute of limitations).

<sup>23</sup> 17 U.S.C. § 115 (2006); *see* Carew v. Melrose Music, Inc., 92 F. Supp. 971, 971 (S.D.N.Y. 1950) (explaining that Copyright Act fails to prescribe accrual time for causes of action and that courts use state statutes of limitations); S. REP. NO. 85-1014, at 1 (stating that Title 17 of United States Code had three-year statute of limitations for all criminal proceedings under § 117); *see also* 17 U.S.C. § 507 (copying text of § 115).

<sup>24</sup> *See* Brady v. Daly, 175 U.S. 148, 158 (1899) (discussing application of state statute of limitations where Congress did not provide limitations period); *McCaleb v. Fox Film Corp.*, 299 F. 48, 50 (5th Cir. 1924) (finding that state law governs where parties filed copyright infringement cause of action); S. REP. NO. 85-1014, at 1-2; *see, e.g.,* Local Trademarks, Inc. v. Price, 170 F.2d 715, 718-19 (5th Cir. 1948) (finding

Louisiana's one-year statute of limitations in *McCaleb v. Fox Film Corp.*<sup>25</sup> By contrast, in *Carew v. Melrose Music, Inc.*, the Southern District of New York found New York's six-year statute of limitations applicable to civil copyright violations.<sup>26</sup> The courts' use of states' statute of limitations periods, however, created a lack of uniformity across the country and led to 17 U.S.C. § 507's codification.<sup>27</sup>

#### B. 17 U.S.C. § 507

Congress enacted 17 U.S.C. § 507 to end courts' use of state-based statutes of limitations for copyright lawsuits, but failed to delineate an accrual rule.<sup>28</sup> This ambiguity created even more confusion in civil copyright infringement lawsuits.<sup>29</sup> The 1976 Copyright Act

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that Alabama copyright infringement lawsuits accrued one year from date of infringement); *Greenbie v. Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957) (applying six-year statute of limitations to New York civil copyright infringement lawsuits); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017-18 (C.D. Cal. 1942) (determining that California copyright infringement lawsuits accrued two years from date of injury).

<sup>25</sup> *McCaleb*, 299 F. at 48.

<sup>26</sup> *Carew*, 92 F. Supp. at 972.

<sup>27</sup> S. REP. NO. 85-1014, at 1-2; see *Local Trademarks, Inc. v. Rogers*, 73 F. Supp. 907, 908 (N.D. Ala. 1947) (indicating that individual state statute of limitations apply to causes of actions for copyright infringement); see, e.g., *Price*, 170 F.2d at 718-719 (finding that Alabama copyright infringement lawsuits accrued one year from date of infringement); *Carew*, 92 F. Supp. at 971-72 (holding that New York copyright infringement lawsuits accrued six years from date of infringement); *Cain*, 47 F. Supp. at 1017-18 (determining that California copyright infringement lawsuits accrued two years from date of injury).

<sup>28</sup> See *William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009); S. REP. NO. 85-1014, at 1-2; see, e.g., *Price*, 170 F.2d at 718, 719 (determining one-year statute of limitations period applied in Alabama); *McCaleb*, 299 F. at 50 (indicating Louisiana applied one-year statute of limitations period); *Rogers*, 73 F. Supp. at 908 (enforcing Alabama's one-year statute of limitations period); *Carew*, 92 F. Supp. at 971-72 (finding New York statute of limitations is six-years from date of infringement); *Cain*, 47 F. Supp. at 1017-18 (using two-year statute of limitations period for civil copyright infringement lawsuits in California). See generally *Brady*, 175 U.S. at 158 (discussing application of state statute of limitations where Congress has not provided otherwise).

<sup>29</sup> See *infra* Part II. Compare *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (applying injury accrual rule), and *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006) (same), with *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at \*5 (S.D.N.Y. Mar. 29, 2002) (applying discovery accrual rule), and *Armstrong v. Virgin Records*, 91 F. Supp. 2d 628, 640 (S.D.N.Y. 2000) (same). See generally *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (analyzing copyright accrual rule ambiguity); *Ramirez*, *supra* note 2, at 1128-29 (discussing confusing status of civil copyright infringement law after most recent Copyright Act amendment).

amendment recodified the criminal statute of limitations in § 507(a), changing the three-year limitations period to five years, but still failing to codify an accrual rule.<sup>30</sup> Subsection (a) indicates only that the limitations period accrues five years from when the criminal cause of action “arose.”<sup>31</sup> Federal courts, however, consistently apply the injury accrual rule in criminal infringement claims, such that the statute of limitations begins running when a plaintiff is injured.<sup>32</sup>

The 1976 amendment also added subsection (b), which enumerates a three-year statute of limitations for civil copyright violations.<sup>33</sup> Similar to the criminal subsection, the civil subsection is also silent regarding which rule of accrual applies.<sup>34</sup> Contrastingly, the statute defines the civil limitations period with the word “accrued” and courts have not uniformly applied a single accrual rule in civil copyright actions.<sup>35</sup>

Until the Supreme Court’s recent holding in *TRW Inc. v. Andrews*, courts generally construed subsection (b) as implementing the discovery accrual rule where the statute of limitations begins accruing when a plaintiff discovers or reasonably should have discovered the infringement.<sup>36</sup> After *TRW*, district courts in the Second Circuit have

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<sup>30</sup> See 17 U.S.C. § 507(a) (2006).

<sup>31</sup> See *id.*; *Cada*, 920 F.2d at 450-51 (defining injury rule); see also S. REP. NO. 85-1014, at 1 (discussing 17 U.S.C. § 115’s relationship to criminal copyright violations).

<sup>32</sup> See *United States v. Shabazz*, 724 F.2d 1536, 1540 (11th Cir. 1984) (asserting that criminal copyright infringement causes of action are subject to statute of limitations beginning to run upon date of last infringement); cf. *Baxter v. Curtis Indus., Inc.*, 201 F. Supp. 100, 101 (N.D. Ohio 1962) (analyzing statute of limitations accrual rule for 17 U.S.C. § 115(b), which is identical precursor to 17 U.S.C. § 507(a)). See generally *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008) (defining injury accrual rule).

<sup>33</sup> See 17 U.S.C. § 507(b) (2006).

<sup>34</sup> Compare 17 U.S.C. § 507(a) (establishing criminal copyright violation statute of limitations period), with 17 U.S.C. § 507(b) (establishing civil copyright violation statute of limitations period).

<sup>35</sup> See 17 U.S.C. § 507(b) (using “accrued” to define when statute of limitations period begins); *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006) (applying injury accrual rule); *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at \*5 (S.D.N.Y. Mar. 29, 2002) (applying discovery accrual rule); *Armstrong v. Virgin Records*, 91 F. Supp. 2d 628, 640 (S.D.N.Y. 2000) (same).

<sup>36</sup> See *TRW Inc. v. Andrews*, 534 U.S. 19, 25, 26 (2001); *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004); *Cada*, 920 F.2d at 450-51; see, e.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997) (applying discovery accrual rule); *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996) (holding discovery accrual rule applies to civil copyright violations); *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994) (same); *Stone v. Williams*, 970



interpreted the Copyright Act's legislative history as demonstrating Congress's adoption of the injury accrual rule in civil copyright infringement lawsuits.<sup>37</sup> The disagreement arises primarily because of the Supreme Court's analysis in *TRW Inc. v. Andrews*.<sup>38</sup>

### C. TRW Inc. v. Andrews

The Supreme Court's decision in *TRW* has generated confusion among district courts over the proper accrual rule for civil copyright lawsuits governed under § 507(b).<sup>39</sup> The *TRW* Court analyzed which accrual rule applied to § 1681p of the Fair Credit Reporting Act ("FCRA").<sup>40</sup> District courts in the Second Circuit have found *TRW*'s accrual rule analysis persuasive when reinterpreting a § 507(b) accrual rule.<sup>41</sup>

In *TRW*, Adelaide Andrews visited a radiologist's office in California in 1993.<sup>42</sup> Unbeknownst to Adelaide, her radiologist's receptionist, Andrea Andrews, copied Adelaide's identifying information and then moved to Nevada where she opened credit accounts using Adelaide's identity.<sup>43</sup> *TRW Inc.* provided Adelaide's credit reports to Andrea in

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F.2d 1043, 1048 (2d Cir. 1992) (same); see also Ramirez, *supra* note 2, at 1131.

<sup>37</sup> See *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 244-45 (S.D.N.Y. 2004); see also *Vasquez v. Torres-Negron*, No. 06CV619, 2007 WL 2244784, at \*5-8 (S.D.N.Y. July 11, 2007) (applying injury accrual rule to civil copyright infringement lawsuits after *TRW* and *Auscape International*); *Roberts v. Keith*, No. 04CV10079, 2006 U.S. Dist. LEXIS 8959, at \*9-10 (S.D.N.Y. Mar. 7, 2006) (same); *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (adopting injury accrual rule in civil copyright infringement lawsuits since *TRW*).

<sup>38</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 244-45; see e.g., *Vasquez*, No. 06CV619, 2007 WL 2244784, at \*5-8 (applying injury accrual rule to civil copyright infringement lawsuits since *TRW* and *Auscape International*); *Roberts*, 2006 U.S. Dist. LEXIS 8959, at \*9-10 (same); *Barksdale*, 211 F.R.D. at 245 (adopting injury accrual rule in civil copyright infringement lawsuits since *TRW*). See generally *TRW*, 534 U.S. at 27-35 (evaluating which statute of limitations accrual rule applies to FCRA).

<sup>39</sup> See generally *TRW*, 534 U.S. at 28 (holding that discovery accrual rule does not apply to FCRA); *William A. Graham Co.*, 568 F.3d at 434-35 (rejecting relevancy of *TRW* to civil copyright accrual rule analysis); *Auscape Int'l*, 409 F. Supp. 2d at 244-45 (applying *TRW*'s analysis and concluding that injury accrual rule applied to civil copyright infringement claims).

<sup>40</sup> See *TRW*, 534 U.S. at 27-35.

<sup>41</sup> See *id.* at 19; see, e.g., *Med. Educ. Dev. Servs., Inc. v. Reed Elsevier Grp., PLC*, 05 Civ. 8665(GEL), 2008 U.S. Dist. LEXIS 76899, \*36 (S.D.N.Y. Sept. 30, 2008) (following *Auscape International*'s reasoning in applying *TRW* to civil copyright lawsuit accrual rule analysis); *Auscape Int'l*, 409 F. Supp. 2d at 244-45 (applying *TRW* accrual rule analysis).

<sup>42</sup> *TRW*, 534 U.S. at 23.

<sup>43</sup> *Id.*

1994, and Adelaide discovered the identity theft in 1995.<sup>44</sup> Adelaide filed a lawsuit against TRW Inc. seventeen months after the discovery for facilitating identity theft.<sup>45</sup> TRW Inc. moved for summary judgment, arguing that the two-year FCRA statute of limitations time-barred the claim because it ran from the date of injury.<sup>46</sup> Adelaide asserted that the claim was timely because the limitations period began to run the day she discovered TRW Inc.'s alleged wrongdoing.<sup>47</sup>

The Supreme Court criticized the court of appeals' adoption of a *per se* general discovery accrual rule whenever Congress does not explicitly legislate otherwise.<sup>48</sup> While lower federal courts have applied the discovery accrual rule where legislation is otherwise silent, the Court refused to adopt a *per se* rule.<sup>49</sup> The Court then analyzed the text and structure of the FCRA's statute of limitations provision and found that § 1681p generally applies the injury accrual rule.<sup>50</sup>

The Court also considered the statute's legislative history, which the Court determined promoted applying the injury accrual rule.<sup>51</sup> The Court noted that Congress rejected language indicative of an injury accrual rule and testimony supporting a discovery accrual rule.<sup>52</sup> However, the Court further recognized that Congress incorporated language in an exception to § 1681p's general rule that provided for a discovery accrual rule.<sup>53</sup> The Court concluded that the discovery accrual rule language was limited to the statute's exception and, thus, determined that the injury accrual rule generally applied.<sup>54</sup>

The application of *TRW's* analysis to civil copyright infringement lawsuits is inconsistent among the courts.<sup>55</sup> Some courts cite *TRW's*

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<sup>44</sup> *Id.* at 24.

<sup>45</sup> *Id.* at 24-25.

<sup>46</sup> *Id.* at 25.

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* at 27 (indicating that Supreme Court has never articulated *per se* discovery accrual rule where statute's accrual rule is unclear).

<sup>49</sup> *See id.* (emphasizing that Court has only recognized standard discovery rule in latent disease and medical malpractice claims).

<sup>50</sup> *See id.* at 28-30. The court further established that § 1681p provides for a discovery accrual rule only where a defendant has made material misrepresentations under the Act. *See id.*

<sup>51</sup> *See TRW*, 534 U.S. at 32-35; H.R. REP. NO. 16-340, at 27 (1970); H.R. REP. NO. 14-765, at 617 (1969).

<sup>52</sup> *See TRW*, 534 U.S. at 33.

<sup>53</sup> *See id.* at 28-30.

<sup>54</sup> *Id.* at 33.

<sup>55</sup> Compare *William A. Graham Co. v. Haughey*, 568 F.3d 425 (3d Cir. 2009) (rejecting *Auscipe International's* use of *TRW* in analyzing 17 U.S.C. § 507(b)), and *Home Design Servs., Inc. v. B & B Custom Homes, LLC*, 509 F. Supp. 2d 968, 972 (D.

rejection of a general discovery accrual rule as a reason to apply the injury accrual rule.<sup>56</sup> However, courts like the Third Circuit find *TRW* irrelevant to copyright lawsuits and instead apply the discovery accrual rule.<sup>57</sup>

#### D. William A. Graham Co. v. Haughey

In *William A. Graham Co. v. Haughey*, the Third Circuit rejected *Auscape International v. National Geographic Society's* analysis and denounced *Auscape International's* reliance on *TRW*.<sup>58</sup> According to the Third Circuit, *TRW* involved the FCRA, not the Copyright Act.<sup>59</sup> The court concluded that *TRW* directs courts to defer to Congress's implicit and explicit directives regarding limitations periods.<sup>60</sup> Where there is no such directive, courts should apply the discovery accrual rule because it is an equitable doctrine and standard practice for federal questions.<sup>61</sup> Given the discovery accrual rule's default application in this context, the court held that *Auscape International* incorrectly applied the injury accrual rule.<sup>62</sup>

The Third Circuit also addressed Congress's alleged assumption that works of art are available for public viewing and, therefore, provide copyright holders prompt infringement notification.<sup>63</sup> The court concluded that Congress's discussions about the public nature of copyright did not show that it rejected a discovery accrual rule for an injury accrual rule.<sup>64</sup> Consequently, the Third Circuit held that

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Colo. 2007) (applying different interpretation of *TRW* than *Auscape International*), with *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235 (S.D.N.Y. 2004) (finding *TRW's* FCRA analysis relevant to understanding 17 U.S.C. § 507(b)).

<sup>56</sup> See, e.g., *Kwan v. Schlein*, 441 F. Supp. 2d 491, 499 (S.D.N.Y. 2006) (applying discovery accrual rule after *Auscape International*); *Auscape Int'l*, 409 F. Supp. 2d at 247 (referencing *TRW's* discussion that Court has only adopted general discovery rule for latent disease and medical malpractice); *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (adopting injury accrual rule in civil copyright infringement lawsuits since *TRW*).

<sup>57</sup> See *William A. Graham Co.*, 568 F.3d at 437; *Warren Freedfeld Assocs. Inc. v. McTigue*, 531 F.3d 38, 44-46 (1st Cir. 2008); *Comcast v. Multi-Vision Elec. Inc.*, 491 F.3d 938, 944 (8th Cir. 2007).

<sup>58</sup> See *William A. Graham Co.*, 568 F.3d at 434 (finding *Auscape International's* analysis and holding erroneous and explicitly rejecting *TRW's* arguably persuasive value).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 26 (2001)).

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 435; see S. REP. NO. 85-1014, at 2 (1957).

<sup>64</sup> See *William A. Graham Co.*, 568 F.3d at 435.

§ 507(b)'s text and legislative history supported its application of the discovery accrual rule.<sup>65</sup>

*E. Statutes of Limitations in Federal Statutes and the Legal Maxim  
Ubi Jus Ibi Remedium*

Interpreting a textually ambiguous statute often entails looking at the statute's legislative history and applying canons of statutory interpretation.<sup>66</sup> For instance, courts sitting in admiralty had difficulties similar to the Third Circuit's when determining which accrual rule applied to lawsuits brought under the Admiralty Act.<sup>67</sup> In *McMahon v. United States*, the Court analyzed the Admiralty Act's statute of limitations provision to resolve when a cause of action "arises."<sup>68</sup> Some courts of appeals held that "arises" indicates accrual upon injury, while others concluded that a cause of action "arises" on the date an individual exhausted her administrative remedies.<sup>69</sup>

In attempting to resolve the circuit split, the Supreme Court discussed the Admiralty Act's legislative history.<sup>70</sup> The Court noted that although Congress amended the Admiralty Act, it did not change the Act's limitations period.<sup>71</sup> The Court concluded that Congress did not intend to apply a different accrual rule and that "arises" implements the injury accrual rule.<sup>72</sup>

The Supreme Court has similarly interpreted "arose" to imply the injury accrual rule.<sup>73</sup> The Court examined "arose" from the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") in

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<sup>65</sup> See *id.* at 437.

<sup>66</sup> See CATHY OKRENT & MARGIE HAWKINS, *TORTS AND PERSONAL INJURY LAW* 27 (2010); Burt Neuborne, *Background Norms for Federal Statutory Interpretation*, 22 CONN. L. REV. 721, 724 (1990); Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business*, 35 WM. & MARY L. REV. 1177, 1210 & n.202 (1994) (stating that legislative intent dominates statutory interpretation in federal courts)

<sup>67</sup> See generally *McMahon v. United States*, 342 U.S. 25, 27 (1951) (conducting analysis of applicable accrual rule for claims arising under Admiralty Act); *Rodinciuc v. United States*, 175 F.2d 479, 482 (3d Cir. 1949) (interpreting accrual rule in admiralty law); *Touchstone v. Land & Marine Applicators, Inc.*, 628 F. Supp. 1202, 1213-14 (E.D. La. 1986) (discussing contending arguments regarding proper accrual rule for admiralty law cause of action).

<sup>68</sup> See *McMahon*, 342 U.S. at 27.

<sup>69</sup> See *id.* at 26.

<sup>70</sup> *Id.* at 27.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *Bay Area Laundry & Dry Cleaning v. Ferbar Corp. of Cal.*, 522 U.S. 192, 195 (1997).

*Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*.<sup>74</sup> Mirroring § 507(a), the MPPAA uses the word “arose” in its statute of limitations provision.<sup>75</sup>

The Court interpreted the statute’s application of “arose” to mean that a complete and presently acquired legal claim starts the limitations period running.<sup>76</sup> Plaintiffs meet this standard when they can file suit and obtain relief.<sup>77</sup> The Court found that the MPPAA’s statute of limitations does not begin running until plaintiffs suffer actual injury.<sup>78</sup> Accordingly, the Court held that “arose” in the MPPAA codifies the injury accrual rule.<sup>79</sup>

To further facilitate interpreting statutes, the Supreme Court has consistently applied the legal maxim *ubi jus ibi remedium* — there is a remedy for every right.<sup>80</sup> This maxim was applied in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which involved a plaintiff’s right to be free from unreasonable searches and seizures.<sup>81</sup> The Court found that the Fourth Amendment provides individuals with a private cause of action against government officials who violate citizens’ federal rights.<sup>82</sup> Where a federal law provides individuals with a right to sue, courts may compensate the individual with any available remedy.<sup>83</sup> The Court emphasized that the right of injured individuals to obtain monetary damages is an important incentive for

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<sup>74</sup> See *id.* at 195.

<sup>75</sup> See *id.* at 201. Section 507(a) of the Copyright Act details the statute of limitations for criminal copyright violations. See 17 U.S.C. § 507(a) (2006). Subsection (a) states that the criminal statute of limitations expires “5 years after the cause of action *arose*.” *Id.* (emphasis added). The MPPAA similarly states that its six-year statute of limitations runs from “the date on which the cause of action *arose*.” Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1451(f)(1) (2006) (emphasis added).

<sup>76</sup> See *Bay Area*, 522 U.S. at 201 (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

<sup>77</sup> See *id.* (citing *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)).

<sup>78</sup> *Id.* at 202.

<sup>79</sup> *Id.* at 201-03.

<sup>80</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). See generally *California v. Sierra Club*, 451 U.S. 287, 300 (1981) (Stevens, J., concurring) (applying archaic legal maxim there is remedy for every right); *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916) (referencing legal maxim *ubi jus ibi remedium*); *United States v. Loughrey*, 172 U.S. 206, 232 (1898) (indicating that maxim *ubi jus ibi remedium* is fundamental concept in law); 2 WILLIAM BLACKSTONE, COMMENTARIES \*23 (defining legal maxim that for every legal right there is remedy); GEOFFREY SAMUEL, SOURCEBOOK ON OBLIGATIONS AND LEGAL REMEDIES 50 (2000) (same).

<sup>81</sup> *Bivens*, 403 U.S. at 389.

<sup>82</sup> *Id.* at 391.

<sup>83</sup> *Id.* at 396.

plaintiffs to protect their civil liberties.<sup>84</sup> Interpreting any element of an ambiguous statute must not frustrate *ubi jus ibi remedium*, which requires providing a remedy for every infringed and litigable right.<sup>85</sup>

## II. *AUSCAPE INTERNATIONAL V. NATIONAL GEOGRAPHIC SOCIETY*

In keeping with the maxim *ubi jus ibi remedium*, most circuit courts have adopted the discovery accrual rule for civil copyright infringement causes of action.<sup>86</sup> The Second Circuit has not ruled on which accrual rule applies in civil copyright lawsuits, but a growing number of district courts in the Second Circuit are employing the injury accrual rule where they once employed the discovery accrual rule.<sup>87</sup> *Auscapse International v. National Geographic Society* led the way, finding that TRW's textual and legislative history analyses required rejecting the discovery accrual rule in civil copyright lawsuits.<sup>88</sup>

*Auscapse International* involved freelance photographers and writers who created images and wrote text for National Geographic Magazine.<sup>89</sup> After releasing its printed magazines, National Geographic produced and marketed digital and microform editions of its past issues.<sup>90</sup> The authors and photographers sued National Geographic under the Copyright Act of 1976, claiming that the digital and microform editions infringed their copyrights.<sup>91</sup>

After rejecting the plaintiff's claims on the merits, the court also considered whether the statute time-barred the claims and whether the

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<sup>84</sup> See *id.* at 396-97 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

<sup>85</sup> See *id.*; see also *Loughrey*, 172 U.S. at 232; SAMUEL, *supra* note 80, at 50;

<sup>86</sup> See, e.g., sources cited *supra* note 9 (applying discovery accrual rule to civil copyright infringement lawsuits).

<sup>87</sup> See *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008); *Vasquez v. Torres-Negron*, No. 06CV619, 2007 WL 2244784, at \*7 (S.D.N.Y. July 11, 2007); *Roberts v. Keith*, No. 04 Civ. 10079(CSH), 2006 WL 547252, at \*3 (S.D.N.Y. Mar. 7, 2006); *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006); *Auscapse Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 247 (S.D.N.Y. 2004).

<sup>88</sup> See generally *TRW Inc. v. Andrews*, 534 U.S. 19, 28-34 (2001) (applying textual and legislative history analyses); *Auscapse Int'l*, 409 F. Supp. 2d at 243-45 (finding TRW's analysis applies to civil copyright accrual rule interpretation); Ramirez, *supra* note 2, at 1142-43 (indicating that *Auscapse International* first reversed post-TRW district court trend of applying discovery accrual rule in Second Circuit).

<sup>89</sup> *Faulkner v. Nat'l Geographic Soc'y*, 294 F. Supp. 2d 523, 525 (S.D.N.Y. 2003) (providing factual background for *Auscapse International*); see *Auscapse Int'l*, 409 F. Supp. 2d at 236-37 (indicating factual background is located in *Faulkner*).

<sup>90</sup> *Faulkner*, 294 F. Supp. 2d at 525.

<sup>91</sup> *Auscapse Int'l*, 409 F. Supp. 2d at 237; *Faulkner*, 294 F. Supp. 2d at 529.

discovery or injury accrual rule applied.<sup>92</sup> Looking to *TRW*, the court asserted that the Supreme Court's rejection of the discovery accrual rule for FCRA claims altered its copyright infringement analysis.<sup>93</sup>

The *Auscape International* court interpreted *TRW* to mean that federal courts may apply the injury accrual rule even where Congress has not explicitly adopted the rule.<sup>94</sup> The court reasoned that *TRW* generally requires courts to examine critically the text, structure, and legislative history of ambiguous statutes.<sup>95</sup> The court therefore looked to the statute's legislative history because § 507(b)'s text offers no guidance regarding which accrual rule applies to civil copyright lawsuits.<sup>96</sup> The court determined that Congress thought that the discovery accrual rule is too unpredictable and, thus, adopted the more certain injury accrual rule.<sup>97</sup>

This determination was guided by § 507(b)'s Senate Report, which observed that published works are generally available to the public.<sup>98</sup> The legislators reasoned that copyright holders therefore learn of their injuries shortly after infringement.<sup>99</sup> The court relied on the Senate Report's observation that infringements are promptly discovered and concluded that Congress intended to apply the injury accrual rule.<sup>100</sup> The district court explicitly rejected the discovery accrual rule, indicating that it is too indefinite and depends on plaintiffs' widely varying diligence.<sup>101</sup> The court dismissed concerns that some individuals who do not discover surreptitious infringement will be unable to obtain a remedy, indicating that Congress knew that not every wrong would be afforded a remedy.<sup>102</sup> Thus, the district court of

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<sup>92</sup> *Auscape Int'l*, 409 F. Supp. 2d at 240-41.

<sup>93</sup> *Id.* at 244.

<sup>94</sup> *See id.* *But see* William A. Graham Co. v. Haughey, 568 F.3d 425, 434 (3d Cir. 2009) (rejecting *Auscape International's* interpretation of *TRW*).

<sup>95</sup> *See Auscape Int'l*, 409 F. Supp. 2d at 244.

<sup>96</sup> *Id.* at 244-47.

<sup>97</sup> *See id.* at 245.

<sup>98</sup> *See id.*; S. REP. NO. 85-1014, at 2 (1957).

<sup>99</sup> *Auscape Int'l*, 409 F. Supp. 2d at 245; S. REP. NO. 85-1014, at 2 (documenting Congress's acknowledgement that published works of art naturally provide copyright holders infringement notice).

<sup>100</sup> *See Auscape Int'l*, 409 F. Supp. 2d at 245.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 245-46. *But see* California v. Sierra Club, 451 U.S. 287, 300 (1981) (Stevens, J., concurring) (applying legal maxim every right has remedy); Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916) (same); United States v. Loughrey, 172 U.S. 206, 232 (1898) (discussing legal maxim *ubi jus ibi remedium* as fundamental legal concept).

the Second Circuit abandoned the once uniformly applied discovery accrual rule and adopted the injury accrual rule.<sup>103</sup>

### III. ANALYSIS

*Auscape International* incorrectly abandoned the discovery accrual rule in civil copyright lawsuits for three reasons. First, a canon of statutory interpretation and *Bay Area Laundry & Dry Cleaning Pension Plan Trust Fund v. Ferbar Corp. of California*'s textual interpretation of "arose" in the MPPAA are persuasive in interpreting § 507.<sup>104</sup> Second, the Copyright Act's legislative history supports applying the discovery accrual rule to protect copyrights.<sup>105</sup> Third, applying the injury accrual rule imposes an undue burden on copyright holders who do not have the resources to investigate every possible infringement.<sup>106</sup> *Auscape International* states that Congress knowingly applied the injury accrual rule even though it would bar some claimants from recovery.<sup>107</sup> However, this contradicts the legal maxim, *ubi jus ibi remedium*, that every legal right has a remedy.<sup>108</sup>

#### A. *The Text of 17 U.S.C. § 507 and U.S. Supreme Court Precedent Support Application of the Discovery Accrual Rule*

The Copyright Act's structure reveals Congress's intent to apply different accrual rules in each subsection of § 507.<sup>109</sup> It is a well-

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<sup>103</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 247.

<sup>104</sup> See *infra* Part III.A. See generally *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192 (1997) (interpreting "arose" under MPPAA to include discovery accrual rule).

<sup>105</sup> See S. REP. NO. 85-1014, at 1-2 (1957); *infra* Part III.B; see also WINCOR & MANDELL, *supra* note 21, at 7.

<sup>106</sup> See *infra* Part III.C.

<sup>107</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 245-46 (claiming that Congress knew some situations would arise under injury accrual rule where copyright-infringed individuals would not be able to recover).

<sup>108</sup> See *infra* Part III.C. See generally BLACKSTONE, *supra* note 80, at \*23 (defining legal maxim that for every legal right, there is remedy); SAMUEL, *supra* note 80, at 50 (same); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1639-40 (2004) (arguing that due process requires ensuring remedy for every right).

<sup>109</sup> Compare 17 U.S.C. § 507(a) (2006) (indicating criminal statute of limitations runs for five years after cause of action arose), with 17 U.S.C. § 507(b) (2006) (indicating civil statute of limitations runs for three years after cause of action accrued). See generally S. REP. NO. 85-1014, at 2 (documenting Congress's discussions regarding codifying § 507); Ramirez, *supra* note 2, at 1128 (observing accrual rule ambiguity surrounding civil copyright violations).



established canon of statutory construction that where the legislature uses varied language within the same statute, courts should infer distinctive meanings.<sup>110</sup> Congress used distinctive language in the statute's criminal and civil copyright infringement subsections.<sup>111</sup> Subsection (a) uses "arose," while subsection (b) uses "accrued."<sup>112</sup>

Subsection (a)'s text mirrors the MPPAA.<sup>113</sup> Both subsections fail to articulate which accrual rule applies, and both use the word "arose" in their statute of limitations provisions.<sup>114</sup> Therefore, the Supreme Court's analysis in *Bay Area* is illustrative of the correct construction of "arose."<sup>115</sup> The Court construed "arose" in the MPPAA to mean that the limitations period begins when a plaintiff acquires a complete cause of action.<sup>116</sup> The Court indicated that a cause of action is not ripe until the plaintiff is able to file suit and obtain relief.<sup>117</sup>

Plaintiffs suffer legally cognizable injury and meet the *Bay Area* standard the instant an infringer violates any of the exclusive protections that federal copyright laws afford authors.<sup>118</sup> When an

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<sup>110</sup> See *William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)); see also *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *Deal v. United States*, 508 U.S. 129, 132 (1993) (indicating that courts must construe meaning of word within context it is used, not in isolation); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (explaining that courts must read statutes as whole).

<sup>111</sup> Compare 17 U.S.C. § 507(a) (using word "arose" in criminal copyright statute of limitations provision), with 17 U.S.C. § 507(b) (using word "accrued" for civil copyright statute of limitations period).

<sup>112</sup> See 17 U.S.C. § 507(a); 17 U.S.C. § 507(b). See generally 17 U.S.C. § 507 (2006) (establishing statute of limitations periods for criminal and civil copyright violations); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (construing meaning of word "arose" in MPPAA context); *William A. Graham Co.*, 568 F.3d at 434 (comparing accrual rule interpretation of words "arose" and "arise").

<sup>113</sup> Compare 17 U.S.C. § 507(a) (using word "arose" in criminal copyright statute of limitations provision), with Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (2006) (using word arose in statute of limitations provision). See generally *Bay Area*, 522 U.S. at 201 (analyzing meaning of "arose" in statute of limitations context).

<sup>114</sup> See sources cited *supra* note 113; see also 17 U.S.C. § 507(a).

<sup>115</sup> See *Bay Area*, 522 U.S. at 201. Compare 17 U.S.C. § 507(a) (codifying criminal copyright infringement statute of limitation), with 17 U.S.C. § 507(b) (codifying civil copyright infringement statute of limitations).

<sup>116</sup> See *Bay Area*, 522 U.S. at 201 (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

<sup>117</sup> See *id.* (citing *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)).

<sup>118</sup> A copyright holder has exclusive rights to the copyrighted work's 1) reproduction, 2) derivative works, and 3) distribution and, where appropriate, the 4) public performance, 5) display, and 6) digital audio transmission. See 17 U.S.C. § 106

infringer violates a copyright holder's rights, the cause of action "arose" because the holder is immediately able to file suit.<sup>119</sup> The *Bay Area Court's* interpretation of "arose" therefore supports similar application of the injury accrual rule in the § 507(a) criminal copyright context.

This conclusion, and the canon of statutory construction regarding different wording within a statute, resolves that the discovery accrual rule applies to civil copyright lawsuits.<sup>120</sup> Courts must infer that Congress intended for the criminal and civil copyright provisions to apply different accrual rules because the subsections use different words.<sup>121</sup> Subsection (a) uses "arose" and, therefore, employs the injury accrual rule. Other than the injury accrual rule, the discovery accrual rule is the only possible rule of accrual.<sup>122</sup> Thus, subsection (b)'s use of "accrued" must employ the discovery accrual rule.

Any arguments for implementing a hybrid rule of accrual that applies an injury or discovery accrual rule depending on the circumstances of a civil copyright case are unfounded. Congress sought a uniform statute of limitations period when it enacted § 507 because federal courts were applying states' inconsistent statutes of limitations.<sup>123</sup> Analogous to applying state based limitations periods, a

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(2006); WILLIAM KRASILOVSKY ET AL., *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 191 (2003) (explaining individual right to sue for infringement of exclusive copyright rights); see also 17 U.S.C. § 507(b); *Johnson v. Gordon*, 409 F.3d 12, 17 (2005); RICHARD STIM, *PATENT, COPYRIGHT & TRADEMARK: AN INTELLECTUAL PROPERTY DESK REFERENCE* 231 (2010); Christian C.M. Beams, Note, *The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . for Now*, 51 FED. COMM. L.J. 823, 825-26 n.9 (1999).

<sup>119</sup> 17 U.S.C. § 507(b); see *Johnson*, 409 F.3d at 17; see also KRASILOVSKY ET AL., *supra* note 118, at 191.

<sup>120</sup> See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 357 (2005) (Souter, J., dissenting) (using rule of statutory construction); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (defining canon of statutory construction); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009) (applying canon of statutory construction).

<sup>121</sup> See sources cited *supra* note 120. Compare 17 U.S.C. § 507(a) (2006) (codifying statute of limitations for criminal copyright infringements), with 17 U.S.C. § 507(b) (codifying statute of limitations for civil copyright infringements).

<sup>122</sup> See Ramirez, *supra* note 2, at 1128 (contemplating discovery accrual rule or injury accrual rule only). See generally *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 247 (S.D.N.Y. 2004) (rejecting discovery accrual rule for injury accrual rule); *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (applying injury accrual rule to civil copyright infringement lawsuits).

<sup>123</sup> See *William A. Graham Co.*, 568 F.3d at 435; S. REP. NO. 85-1014, at 2 (1957); *supra* Part I.A. See generally 17 U.S.C. § 507 (codifying criminal and civil copyright infringement statute of limitations).

hybrid accrual rule will require courts to assess which rule applies on a case-by-case basis. This will lead to a wide divergence in outcomes based on varying factual details, thereby frustrating Congress's aim for uniformity. Thus, canons of statutory construction, in conjunction with Congress's intent, demonstrate that the Court should apply the discovery accrual rule to civil copyright infringement lawsuits.<sup>124</sup>

B. *Auscape International's Adoption of the Injury Accrual Rule Is Inconsistent with the Legislative Intent of the Copyright Act*

When a statute is ambiguous on its face, courts look to the law's legislative history and congressional intent.<sup>125</sup> Section 507's text fails to clearly define an applicable accrual rule on its face.<sup>126</sup> The Supreme Court has recognized consistently that Congress enacted the Copyright Act to promote and protect artists' production of creative works particularly because substantial resources are invested into creating copyrighted works.<sup>127</sup> Time-barring individuals' claims for failing to notice an injury promptly, as the injury accrual rule requires, subjects individuals to remediless infringement.<sup>128</sup> This thwarts

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<sup>124</sup> See *William A. Graham Co.*, 568 F.3d at 435; S. REP. NO. 85-1014, at 2. See generally 17 U.S.C. § 507 (2006) (codifying copyright infringement statute of limitations).

<sup>125</sup> See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) (illustrating courts' use of legislative history and statutory intent when interpreting ambiguous statutes); STEPHEN ELIAS & SUSAN LEVINKIND, *LEGAL RESEARCH: HOW TO FIND & UNDERSTAND THE LAW* 119 (2007) (emphasizing method of using congressional intent in interpreting statutes); ROBERT A. KATZMANN, *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 9 (1988) (discussing that courts commonly reference legislative and statutory intent in their analyses).

<sup>126</sup> See 17 U.S.C. § 507.

<sup>127</sup> See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524-26 (1994) (providing that primary objective of Copyright Act of 1976 is to promote original literary, artistic, and musical expression's continued development to benefit public); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 545-46 (1985) (asserting that Copyright Act aimed to promote harvest of and contribution to knowledge and to ensure fair return for those who contribute); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (affirming Copyright Act's intent to stimulate creative works to benefit public).

<sup>128</sup> Cf. *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936) (applying regulation's amendment over original regulation that was contrary to statute's intent); *Mohnkern v. Prof'l Ins. Co.*, 542 F.3d 157, 160 (6th Cir. 2008) (affirming lower court's holding that taking into account certain considerations would be contrary to intent of statute); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 27 C.I.T. 671, 675 (Ct. Int'l Trade 2003) (finding that one interpretation of statute would be contrary to legislative intent).

Congress's purpose in providing copyright protections.<sup>129</sup> Courts that apply the injury accrual rule thus act contrary to Congress's intent.<sup>130</sup>

Further, creative individuals will have less incentive to generate artistic works if infringers can circumvent their copyrights through covert action.<sup>131</sup> The fear that a copyright holder's time and effort will be fruitless will suppress artistic endeavors.<sup>132</sup> The discovery accrual rule, conversely, affords individuals redress when infringers inconspicuously violate a copyright and thereby promotes artistic creation.<sup>133</sup>

However, injury accrual rule proponents may argue that Congress enacted the three-year statute of limitations to promote a standard limitations period for civil copyright infringement lawsuits.<sup>134</sup> According to this argument, the discovery accrual rule possesses the same lack of uniformity that Congress sought to eliminate.<sup>135</sup> Plaintiffs might discover infringement at any time, even after the copyright has expired, so the limitations period could begin ninety years from the

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<sup>129</sup> See sources cited *supra* note 128.

<sup>130</sup> See S. REP. NO. 85-1014, at 1-2 (1957); *cf.* sources cited *supra* note 128 (coordinating statutory enforcement with congressional intent).

<sup>131</sup> See Matthew Becker, *Reconceptualizing Copyright in Virtual Worlds*, HARV. J.L. & TECH. DIG., Dec. 26, 2010, <http://jolt.law.harvard.edu/digest/copyright/digest-comment-re-conceptualizing-copyright-in-virtual-worlds> (contemplating how failed copyright protections for virtual gaming worlds may disincentivize creation of such games). See generally *Khler v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (discussing fraudulent concealment exception for injury accrual rule); *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008) (evaluating injury accrual rule's application in context of concealment); *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 246 (S.D.N.Y. 2004) (noting Representative Crumpacker's concern regarding inconspicuous infringement); S. REP. NO. 85-1014, at 2 (providing evidence of Congress's intent when instituting civil copyright statute of limitations provision).

<sup>132</sup> See generally S. REP. NO. 85-1014, at 2 (providing Congress's intent to promote artistic endeavors); *WINCOR & MANDELL*, *supra* note 21, at 1980 (discussing Congress's desire for Copyright Act that protects individuals' creative works and thereby promotes creation).

<sup>133</sup> See generally *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008) (defining discovery accrual rule); S. REP. NO. 85-1014, at 2 (indicating that Congress intended for Copyright Act to promote artistic creation).

<sup>134</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 244-48 (referencing legislative history of 17 U.S.C. § 507(b)); *see, e.g., CA, Inc.*, 579 F. Supp. 2d at 360-61 (agreeing with *Auscape International's* reliance on 17 U.S.C. § 507(b)'s legislative history); *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006) (finding *Auscape International's* analysis of 17 U.S.C. § 507(b)'s legislative history persuasive).

<sup>135</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 245; *see also Disabled in Action of Pa.*, 539 F.3d at 209 (applying discovery accrual rule); S. REP. NO. 85-1014, at 1-2.

date of infringement.<sup>136</sup> Such an extensive period of uncertainty undermines the purpose of statutes of limitations themselves.<sup>137</sup> The injury accrual rule is much more certain and uniform and, therefore, is consistent with the strict three-year limitations period Congress enacted.<sup>138</sup>

This argument fails because it overstates the concerns motivating Congress to enact § 507(b).<sup>139</sup> Section 507(b)'s legislative history alone is not dispositive of which accrual rule applies to civil copyright infringement lawsuits.<sup>140</sup> The Senate Report explicitly indicates that Congress found that state statutes of limitations ranged from one to eight years.<sup>141</sup> Congress aimed only to address courts' use of varying state statutes of limitations.<sup>142</sup> Section 507(b) achieves this goal with its uniform three-year limitations period.<sup>143</sup>

The legislative intent behind the Copyright Act, which encompasses § 507(b)'s statute of limitations provision, is more relevant because it provides copyright's overarching purpose to promote artistic development.<sup>144</sup> The narrower purpose of § 507(b) should comply with Congress's broader rationale in enacting the Copyright Act's

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<sup>136</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 245; cf. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (discussing possibility of tolling statute of limitation in civil copyright infringement lawsuits). See generally *Disabled in Action of Pa.*, 539 F.3d at 209 (summarizing scope of discovery accrual rule).

<sup>137</sup> See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 346 (1983); *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

<sup>138</sup> See 17 U.S.C. § 507(b) (2006); *Auscape Int'l*, 409 F. Supp. 2d at 245 (holding that injury accrual rule governs civil copyright infringement lawsuits); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (defining injury accrual rule).

<sup>139</sup> See S. REP. NO. 85-1014, at 1-2; see also *William A. Graham Co. v. Haughey*, 568 F.3d 425, 435-37 (3d Cir. 2009); *Auscape Int'l*, 409 F. Supp. 2d at 245 (asserting Congress's application of three-year statute of limitations aimed to create certainty regarding timeliness of filing claims).

<sup>140</sup> See *William A. Graham Co.*, 568 F.3d at 435-37 (rejecting defendant's claim that legislative history of 17 U.S.C. § 507(b) supports application of injury accrual rule); S. REP. NO. 85-1014, at 1-2. *But see Auscape Int'l*, 409 F. Supp. 2d at 244-48 (finding that legislative history of 17 U.S.C. § 507(b) supports application of injury accrual rule).

<sup>141</sup> S. REP. NO. 85-1014, at 2; see *Auscape Int'l*, 409 F. Supp. 2d at 245.

<sup>142</sup> See *William A. Graham Co.*, 568 F.3d at 435-37; see also S. REP. NO. 85-1014, at 2 (documenting Alabama's one-year statute of limitations, California's two-year statute of limitations, New York's six-year statute of limitations, and Wyoming's eight-year statute of limitations). *But see Auscape Int'l*, 409 F. Supp. 2d at 245.

<sup>143</sup> See 17 U.S.C. § 507(b); see also *William A. Graham Co.*, 568 F.3d at 433; S. REP. NO. 85-1014, at 1-2 (noting Congress's desire for uniform statute of limitations).

<sup>144</sup> See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524-26 (1994); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 545-46 (1985); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

regulatory scheme.<sup>145</sup> Congress's established intent means that the Court should adopt the discovery accrual rule.<sup>146</sup>

C. *The Injury Accrual Rule Is Contrary to the Legal Maxim Ubi Jus Ibi Remedium*

The *Auscape International* court indicated that whether a copyright owner is aware of alleged infringement is irrelevant to analyzing which accrual rule applies.<sup>147</sup> The court concluded that Congress passed § 507(b) knowing that it would not provide remedies for all wrongs.<sup>148</sup> The court's conclusion, however, is contrary to the well-established legal maxim, *ubi jus ibi remedium*, every legal right has a remedy.<sup>149</sup> The Supreme Court frequently resorts to this legal maxim and has established it as a fundamental principle in every area of law.<sup>150</sup> Thus, passing a statute violating this legal maxim ignores centuries of American law and jurisprudence.<sup>151</sup>

The American legal system protects individuals' civil rights and liberties.<sup>152</sup> For instance, the Supreme Court's holding in *Bivens* compels courts to provide legal remedies for legal wrongs.<sup>153</sup> In *Bivens*, the Court awarded the plaintiff monetary damages where government officials violated his Fourth Amendment right to be free from unreasonable searches and seizures.<sup>154</sup> Just as the Fourth Amendment grants the right to be free from unreasonable searches and seizures, the Constitution's Intellectual Property Clause grants exclusive rights

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<sup>145</sup> See sources cited *supra* note 66; *cf.* *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (indicating that Court always interprets Cruel and Unusual Punishments Clause in conjunction with clause's purpose).

<sup>146</sup> See sources cited *supra* note 144.

<sup>147</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 246; *Copyrights-Statute of Limitations: Hearing on H.R. 781 Before the H. Comm. on the Judiciary*, 84th Cong. 40 (1955) (statement of Rep. Crumpacker).

<sup>148</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 246.

<sup>149</sup> See generally sources cited *supra* note 80.

<sup>150</sup> See *Sierra Club*, 451 U.S. at 300; *Rigsby*, 241 U.S. at 39-40; *Loughrey*, 172 U.S. at 232; BLACKSTONE, *supra* note 80, at \*23; SAMUEL, *supra* note 80, at 50.

<sup>151</sup> See sources cited *supra* note 150.

<sup>152</sup> See *Davis v. Passman*, 442 U.S. 228, 242 (1979) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

<sup>153</sup> See *Bivens*, 403 U.S. at 397 (holding that individuals must be compensated for violations of their federal rights); see also *Sierra Club*, 451 U.S. at 300; *Rigsby*, 241 U.S. at 39-40.

<sup>154</sup> See *Bivens*, 403 U.S. at 397.

in one's creative works.<sup>155</sup> The district court's acknowledgement that the injury accrual rule fails to provide protection in certain situations is contrary to the legal system's fundamental purpose to protect civil rights and liberties.<sup>156</sup> The discovery accrual rule accounts for circumstances of concealed infringement.<sup>157</sup> Thus, the discovery rule provides a remedy for every copyright infringement.<sup>158</sup>

Opponents of the discovery accrual rule may contend that the Supreme Court has only applied the rule in latent injury and medical malpractice cases.<sup>159</sup> According to this argument, the Supreme Court applies a general discovery accrual rule only in cases where plaintiffs' injuries do not promptly materialize.<sup>160</sup> In cases of latent injury and medical malpractice, individuals often do not discover their injuries until they physically manifest.<sup>161</sup> Copyright infringement, by comparison, is not such a situation.<sup>162</sup>

This argument necessarily fails. The Court has not limited the discovery accrual rule to particular circumstances and has not yet evaluated the rule's relevance to civil copyright violations.<sup>163</sup> As

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<sup>155</sup> See U.S. CONST. art. I, § 8, cl. 8 (protecting individuals' intellectual property rights); *Eldred v. Ashcroft*, 537 U.S. 186, 192-93 (2003) (analyzing Constitution's Copyright and Patent Clause). See generally U.S. CONST. amend. IV (protecting citizens from unreasonable searches and seizures).

<sup>156</sup> See *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (finding that strict application of injury accrual rule harms faultless plaintiffs and goes against tenor of statute); S. REP. NO. 85-1014, at 2 (1957); see also *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 246 (S.D.N.Y. 2004) (dismissing concern that remedy is not available to some plaintiffs under certain circumstances).

<sup>157</sup> See generally *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008) (defining discovery accrual rule); *Auscape Int'l*, 409 F. Supp. 2d at 246 (finding there is no concealed infringement concern); S. REP. NO. 85-1014, at 2 (discussing Congress's concealed infringement concern).

<sup>158</sup> See generally *Bivens*, 403 U.S. at 397 (holding that individuals must be compensated for violations of their federal rights); *Disabled in Action of Pa.*, 539 F.3d at 209 (defining discovery accrual rule); S. REP. NO. 85-1014, at 2 (articulating Congress's concealed infringement concern).

<sup>159</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 247; see, e.g., *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (applying discovery accrual rule to latent medical injury); see also *TRW Inc. v. Andrews*, 534 U.S. 19, 27-31 (2001); *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

<sup>160</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 247; see also *TRW*, 534 U.S. at 27-31; *Rotella*, 528 U.S. at 555.

<sup>161</sup> See sources cited *supra* note 159.

<sup>162</sup> See sources cited *supra* note 159. But see *Roley v. New World Pictures Ltd.*, 19 F.3d 479, 480 (9th Cir. 1994) (illustrating instance where plaintiff was unaware of copyright infringement).

<sup>163</sup> See generally *TRW*, 534 U.S. at 27-31 (discussing two contexts where Court applied discovery accrual rule, but not limiting rule's application to similar contexts);

previously argued, civil copyright violations require courts to apply the discovery accrual rule.<sup>164</sup> Similar to latent medical injuries, copyright infringement can occur without the victim's knowledge where covert action is taken to violate a copyright.<sup>165</sup>

The fear that the injury accrual rule's limitations period will begin unbeknownst to the author requires copyright holders to expend extensive resources monitoring infringement.<sup>166</sup> Large companies often have teams dedicated to policing their copyrights.<sup>167</sup> However, for smaller companies or individuals, monitoring can be extremely costly and impractical when the infringer is not readily identifiable.<sup>168</sup> Thus, expending limited finances and resources to comply with the injury

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*Rotella*, 528 U.S. at 555 (failing to dictate strict rule that discovery accrual rule is only used where cry is loudest); *Kubrick*, 444 U.S. at 122 (applying discovery accrual rule to latent medical injury, but not articulating exclusive application to that context). *But see Auscape Int'l*, 409 F. Supp. 2d at 247 (explaining that Court has held discovery accrual rule is only used where cry is loudest).

<sup>164</sup> See *supra* Part III.A-B (articulating reasons Court should adopt discovery accrual rule).

<sup>165</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 245-46 (noting Representative Crumpacker's concern that infringement would occur without copyright holder's knowledge); see, e.g., *Roley*, 19 F.3d at 480 (illustrating possibility that infringement may occur unbeknownst to copyright holder); *Barksdale v. Robinson*, 211 F.R.D. 240, 243 (S.D.N.Y. 2002) (providing factual scenario where plaintiff's copyright was unknowingly infringed).

<sup>166</sup> See *Auscape Int'l*, 409 F. Supp. 2d at 246 (indicating copyright holder's failure to notice infringement is irrelevant when evaluating start of statute of limitations period under injury accrual rule); Beams, *supra* note 118, at 830; *What Is Copyright Infringement: Featured Article*, BUSINESSKNOWLEDGESOURCE.COM, [http://www.businessknowledgesource.com/blog/what\\_is\\_copyright\\_infringement\\_featured\\_article\\_026580.html](http://www.businessknowledgesource.com/blog/what_is_copyright_infringement_featured_article_026580.html) (last visited Dec. 23, 2010) (discussing differences in copyright infringement monitoring resources available for large and small companies).

<sup>167</sup> See Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1493, 1499 (1995) (indicating that copyright holders with resources to monitor infringement are more able to prevent infringement); *What Is Copyright Infringement: Featured Article*, *supra* note 166; see e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492, 1495 (E.D. Cal. 1994) (finding defendants lacked power to supervise copyrights).

<sup>168</sup> Cf. Beams, *supra* note 118, at 830 (discussing possibility that smaller service providers will be pushed out of business with requirement that they monitor every internet copyright infringement); Alexander J. Kramer, Note, *Losing the Protected Status of Attorney Opinion Work Product: An Examination of Regional Airport Authority of Louisville v. LFG, L.L.C.*, 41 UC DAVIS L. REV. 1705, 1729 (2008) (asserting that bright-line rule under Rule 26 of Federal Rules of Civil Procedure creates unfair bias toward parties with endless funds to support their legal endeavors over those who do not have funds). See generally *What Is Copyright Infringement: Featured Article*, *supra* note 166 (noting resource differences between larger and smaller companies used in identifying copyright infringement).



accrual rule disparately burdens these copyright holders.<sup>169</sup> Applying the injury accrual rule to civil copyright violations is fundamentally unfair to copyright holders who cannot effectively police their copyrights.<sup>170</sup> The discovery accrual rule obviates the need for copyright holders to monitor strictly their copyright since accrual is based on when knowledge of the infringement is or should reasonably be acquired.<sup>171</sup>

#### CONCLUSION

A standard statute of limitations rule of accrual is essential in all areas of litigation, but is missing in civil copyright law.<sup>172</sup> Nevertheless, courts disagree whether the injury accrual rule or discovery accrual rule applies.<sup>173</sup> Canons of statutory construction require the Copyright Act's civil statute of limitations provision to include the discovery accrual rule.<sup>174</sup> Moreover, Congress intended for

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<sup>169</sup> Cf. Beams, *supra* note 118, at 830 (discussing effects of stringent copyright monitoring requirements on smaller service providers who are copyright holders); Kramer, *supra* note 168, at 1729 (emphasizing that Federal Rule of Civil Procedure 26 unfairly biases financially stable parties over financially unstable parties). See generally *What Is Copyright Infringement: Featured Article*, *supra* note 166 (evaluating resource disparity between large and small companies who must monitor copyright infringement).

<sup>170</sup> See Ginsburg, *supra* note 167, at 1493, 1499; *What Is Copyright Infringement: Featured Article*, *supra* note 166; see e.g., *Fonovisa, Inc.*, 847 F. Supp. at 1495 (finding that defendants lacked resources to monitor copyrights).

<sup>171</sup> See generally *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008) (describing discovery accrual rule); Ginsburg, *supra* note 167, at 1493, 1499 (discussing problems surrounding monitoring copyrights); *What Is Copyright Infringement: Featured Article*, *supra* note 166 (analyzing monitoring resource differences between large and small companies).

<sup>172</sup> See *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (indicating statute of limitations is not just formality but basic component of well-ordered judicial system); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) (discussing possible arbitrary determination of statute of limitations but nevertheless purposeful application to causes of action); *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003) (discussing purpose of statute of limitations); *Statute of Limitations*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, available at <http://www.answers.com/topic/statute-of-limitations> (last visited Jan. 3, 2011) (indicating statutes of limitations date back to early Roman law and have been central force in European and U.S. law).

<sup>173</sup> See *supra* Part II. Compare *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944, at \*1 (S.D.N.Y. Jan. 11, 2006) (applying injury accrual rule), and *Barksdale v. Robinson*, 211 F.R.D. 240, 245 (S.D.N.Y. 2002) (same), with *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at \*5 (S.D.N.Y. Mar. 29, 2002) (applying discovery accrual rule), and *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d. 628, 640 (S.D.N.Y. 2000) (same).

<sup>174</sup> See *supra* Part III.A.

the Copyright Act to provide incentives for individuals to develop artistic works by affording them protections over their creations.<sup>175</sup> The injury accrual rule denies remedies to some copyright holders and thereby undermines Congress's intent.<sup>176</sup> Creators will be concerned that their time and effort will go to waste if an individual infringes the copyright without the copyright holder's knowledge.<sup>177</sup> The legal maxim that every legal right has a remedy further compels the Supreme Court to adopt the discovery accrual rule.<sup>178</sup> The injury accrual rule places a disparate burden on copyright holders who have few resources to monitor every possible infringement.<sup>179</sup> Therefore, the discovery accrual rule is the correct accrual rule for civil copyright lawsuits.<sup>180</sup>

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<sup>175</sup> See *supra* Part III.B.

<sup>176</sup> See *supra* Part III.B.

<sup>177</sup> See *supra* Part III.B.

<sup>178</sup> See *supra* Part III.C. See generally sources cited *supra* note 80.

<sup>179</sup> See *supra* Part III.C.

<sup>180</sup> See *supra* Part III.