No. 09-

IN THE

Supreme Court of the United States

USI MIDATLANTIC, INC., AND WILLIAM HAUGHEY,

Petitioners,

v.

WILLIAM A. GRAHAM COMPANY D/B/A THE GRAHAM COMPANY,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

FLOYD ABRAMS
SUSAN BUCKLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005

THOMAS C. GOLDSTEIN
Counsel of Record
PATRICIA A. MILLETT
L. RACHEL HELYAR
MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER &FELD, LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

Attorneys for Petitioner

August 28, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTIONS PRESENTED

1. Whether, for a cause of action arising under federal law, the default rule is that the "statute of limitations begins to run when the cause of action is complete," absent contrary indications in the statute, *TRW, Inc. v. Andrews*, 534 U.S. 19, 39 (2001) (Scalia, J., concurring), as the Fifth Circuit has held, or whether the default rule is that the limitations period begins to run at the time that injury is discovered, as the Third Circuit held here.

2. Whether the Third Circuit erred in holding, based on its prior decision in *Merck & Co. v. Reynolds*, *cert. granted* No. 08-905 (May 26, 2009), that, under its default "time of discovery" rule for triggering a statute of limitations, the plaintiff had no duty to investigate the factual basis of its claim until it had specific evidence of each element of its claim.

PARTIES TO THE PROCEEDING

The caption lists all the parties to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner USI MidAtlantic, Inc. has the following parent corporations: USI Insurance Services, LLC, wholly owned by Compass Acquisition Holdings Corporation, wholly owned by Compass Investors, Inc. No publicly held company owns 10% or more of the party's stock. The following non-public investment funds own more than 10% of Compass Investors, Inc.: GS Capital Partners VI Fund, L.P.; GS Capital Partners VI Offshore Fund, L.P.; and GS Capital Partners VI Parallel, L.P.

Blank Page

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

Blank Page

In the Supreme Court of the United States

USI MIDATLANTIC, INC., AND WILLIAM HAUGHEY,

Petitioners,

v.

WILLIAM A. GRAHAM COMPANY D/B/A THE GRAHAM COMPANY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

USI MidAtlantic, Inc. ("USI"), and William Haughey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 568 F.3d 425. The opinion of the district court (App., *infra*, 39a-68a) is reported at 484 F.Supp.2d 324.

JURISDICTION

The court of appeals entered its judgment on June 5, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, the Copyright Act provides that "[n]o 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).

STATEMENT OF THE CASE

The Copyright Act sets forth a three-year statute of limitations. Respondent's claim of copyright infringement against USI, however, rests on acts that occurred over a decade prior to the date respondent brought suit. The Third Circuit nonetheless held that respondent's complaint was timely on the theory that federal statutory claims are presumptively subject to a plaintiff-friendly "time of discovery accrual rule." In addition, applying its decision in *Merck & Co. Securities, Derivative & "ERISA" Litigation*, 543 F.3d 150 (3d Cir. 2008), *cert. granted*, No. 08-905 (May 26, 2009), the Third Circuit held that respondent was not on sufficient notice at the time of infringement to trigger the Copyright Act's limitations period because the numerous warnings and signs of infringement that respondent had received did not establish every single element of its claim.

1. USI and respondent are insurance brokerage firms that procure insurance coverage for their customers. App., *infra*, 3a; C.A. J.A. 4, 187-188, 194-195. In 2005, respondent sued USI for copyright infringement under the Copyright Act, 17 U.S.C. §§ 501, 504. *See* App., *infra*, 8a. That Act provides, as relevant here, that "[n]o 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).

Respondent's suit rests on conduct that began over thirteen years prior to the filing of its complaint. In 1991, respondent copyrighted certain documents that were referred to below as the "Standard Works." App. 4a. Respondent designed the Standard Works for its salespersons, known as "producers," to use in crafting client-specific insurance proposals. *Id.* Respondent placed the Standard Works in binders, which it distributed to its producers, *id.* at 42a, and it put copyright notices on client documents that incorporated the Standard Works, *id.* at 4a.

Respondent employed William Haughey as a producer from January 1985 through September 1991. App., *infra*, 3a. During his employment, Haughey was provided a set of binders containing the Standard Works. *Id.* at 4a, 43a. Haughey's was one of only eight copies of the Standard Works. Pursuant to a termination agreement with respondent, Haughey promised that he (i) would not solicit respondent's clients, (ii) would keep respondent's business information confidential, and (iii) would return to respondent all company papers

and information in his possession, including the Standard Works. *Id.* at 5a Following his termination, however, Haughey retained the binders that contained portions of the Standard Works. *Id.* Although respondent asserted that it considered the Standard Works essential to its business, it did not ask Haughey to return his binders after it terminated his employment. C.A. J.A. 368-369, 371.

Shortly after he was terminated by respondent, Haughey was hired at a competing brokerage firm, Flanigan, O'Hara, & Gentry ("Flanigan"). App., *infra*, 5a, 50a-52a. At about the time Haughey joined Flanigan, he solicited certain of respondent's clients. *Id.* at 5a. In November 1991, respondent, Flanigan, and Haughey entered into an agreement that called on respondent to sell Flanigan six of the accounts on which Haughey had worked while he was employed by respondent. *Id.* at 6a. As part of the agreement, respondent gave Flanigan and Haughey materials related to those six accounts, including copyrighted material in the Standard Works. *Id.* In exchange, Haughey promised respondent that he would keep information concerning the Standard Works confidential and return all papers and information he obtained from respondent, other than the materials related to the six accounts, and that he would not use, disclose, or divulge respondent's confidential information in connection with solicitations of other Flanigan clients. *Id.* Even after respondent solicited respondent's clients, resulting in the November 1991 agreement, respondent did not ask Haughey to return his set of binders containing the Standard Works. C.A. J.A. 369.

Beginning in July 1992, Haughey included portions of the Standard Works in proposals he made to Flanigan clients. App., *infra*, 6a. In 1994 or 1995, Flanigan copied the Standard Works into its word processing system, and paper copies of the Standard Works were given to Flanigan employees. *Id.* at 7a.

In 1995, USI acquired Flanigan, and the Standard Works were made available to USI's employees. App., *infra*, 7a. USI incorporated the Standard Works into some client proposals through 2005. *Id.* at 8a.

2. In February 2005, nearly fourteen years after Haughey left its employment without returning the binders and after respondent knew that Haughey retained copyrighted material for at least six accounts, and over a decade after the alleged acts of infringement, respondent sued USI and Haughey for copyright infringement. App., *infra*, 8a-9a, 44a. USI moved for partial summary judgment, contending that the Copyright Act's statute of limitations, 17 U.S.C. § 507(b), cut off any claim of infringement that occurred more than three years before the filing of the complaint. App., *infra*, 8a-9a. The district court denied USI's motion, holding that the "discovery rule" applied rather than the earlier-commencing "injury rule" (under which the limitations period starts running at the time the plaintiff has a completed cause of action). *Id.* at 9a.

At trial, the district court presented special interrogatories to the jury asking, *inter alia*, whether "[p]rior to February 9, 2002, should [respondent]

have discovered, with the exercise of reasonable diligence, that defendants were infringing its copyrights?" App., *infra*, 9a-10a. The jury found the defendants liable for copyright infringement and answered the special interrogatory in the negative, *id.* at 10a, thereby allowing respondent to recover for all of the alleged acts of infringements of its copyrights dating back to July 1992. *Id.* at 7a n.2. Based on the broad temporal scope of the claim, the jury awarded respondent $16,561,230 against USI and $2,297,397 against Haughey. *Id.* at 9a.

After the jury issued its verdict, the district court ordered a new trial on the ground that the weight of the evidence did not support the jury's answer to the special interrogatory regarding pre-February 9, 2002 acts of infringement. App., *infra*, 10a. In ordering a new trial on damages, the district court identified numerous pre-2002 warning signs of infringement that respondent unreasonably failed to investigate to protect its copyright, including that: (1) Haughey had respondent's copyrighted works in his possession when respondent terminated him in 1991; (2) Haughey failed to honor his obligation to return the works when he was terminated; (3) Haughey's only purpose for having those works was to copy and use them; (4) Haughey joined a competitor of respondent following his termination; and (5) after Haughey's departure, respondent learned that he had solicited respondent's clients in violation of his employment and termination agreements with respondent. *Id.* at 12-13a, 48a-59a. *See also id.* at 66a (granting partial summary judgment).

In a second jury trial on damages arising from petitioners' infringement during the three-year period before the action was brought (February 9, 2002 to February 8, 2005), the jury awarded respondent $1,400,000 against USI and $268,000 against Haughey. App., *infra*, 13a.

3. The court of appeals reversed. App., *infra*, 38a. The court held that federal statutory claims, including claims under the Copyright Act, are presumptively subject to a discovery-accrual rule, and thus that respondent's claim did not accrue until it first discovered the actual acts of infringement in November 2004. App., *infra*, 32a-33a.

In so holding, the court of appeals read this Court's decision in *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), to command federal courts to apply a default discovery-accrual rule for federal statutory claims. Specifically, the court of appeals adopted a rule that, "in the absence of a contrary directive from Congress, we apply the federal discovery rule." App., *infra*, 16a (internal quotations omitted).

Applying that default discovery-accrual rule, the court of appeals held that the Copyright Act is subject to a discovery rule because Congress had not specified the time of injury (infringement) as the accrual trigger. The Third Circuit also rejected USI's argument that the Copyright Act is better read to impose an injury-accrual rule, reasoning instead that "the text and structure of the Copyright Act actually favor use of the discovery rule." App., *infra*, 17a.

Having decided that the discovery-accrual rule applies to copyright infringement claims, the court of appeals next held that the district court erred in finding that respondent was on inquiry notice of any copyright infringement long before February 2002. App., *infra*, 25a-33a. Relying on its earlier decision in *Merck & Co. Securities, Derivative & "ERISA" Litigation*, 543 F.3d 150 (3d Cir. 2008), *cert. granted*, No. 08-905 (May 26, 2009), the court of appeals ruled that the multiple warning signs of infringement that the district court had identified were, as a matter of law, irrelevant. In the court of appeals' view, respondent's knowledge of Haughey's improper retention of the copyrighted works, his propensity to engage in misconduct, and his continued possession of the Standard Works did not constitute specific evidence of each element of a copyright infringement claim and thus did not place respondent on notice of its claim. App., *infra*, 27a-31a.[1]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT BY RECONFIRMING ITS LONGSTANDING RULE, REFLECTED IN THE CONCURRENCE IN *TRW V. ANDREWS* AND LATER CASES, THAT FEDERAL

---

[1] The court of appeals remanded for consideration of USI's alternative ground for a new trial on damages – namely, whether the weight of the evidence supported the jury's apportionment and the size of the verdict. App., *infra*, 38a.

STATUTORY CLAIMS PRESUMPTIVELY ACCRUE AT THE TIME OF INJURY, AND NOT AT THE TIME OF DISCOVERY.

This Court's review is warranted because, with the exception of the Fifth Circuit, the federal courts of appeals (including the Third Circuit here) have broadly departed from this Court's longstanding precedent establishing that the default rule for accrual of a federal statutory claim is the date of the injury, not the date of discovery.

Federal statutory causes of action regularly specify a limitations period, generally measured from the date that the claim "arises" or "accrues."[2] The background rule has long been that a claim arises or accrues when the injury giving rise to the cause of action occurs. *See, e.g., TRW, Inc. v. Andrews,* 534 U.S. 19, 36-37 (2001) (Scalia, J., concurring). When Congress wishes to depart from that rule, it generally specifies that the limitations

---

[2] *See, e.g.*, 7 U.S.C. § 25 (cause of action related to misconduct in commodity exchanges "shall be brought not later than two years after the date the cause of action arises"); 22 U.S.C. § 2356 (cause of action against United States related to foreign-held patents must be brought "within six years after the cause of action arises"); 7 U.S.C. § 2305(c) (cause of action for unfair trade practices affecting agricultural producers must be "commenced within two years after the cause of action accrued"); 12 U.S.C. § 1977(1) (cause of action challenging bank tying arrangements must be "commenced within four years after the cause of action accrued").

period runs from "the date of the discovery" of the injury (*e.g.*, 18 U.S.C. § 1030(g)) or "after such discovery should have been made by the exercise of reasonable diligence" (*e.g.*, 15 U.S.C. § 77m). *See TRW,* 534 U.S. at 38 (Scalia, J., concurring). Absent such an express statutory directive, "[t]he only other cases in which [this Court] ha[s] recognized a prevailing discovery rule ... were decided in two contexts, latent disease and medical malpractice, 'where the cry for such a rule is loudest'" because the plaintiff typically is unaware of and unable to learn of her injury at the time it is inflicted. *TRW*, 534 U.S. at 27 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (alteration omitted).

Even though this Court has repeatedly explained that the standard rule of accrual is that the limitations period commences at the time of injury, *TRW*, 534 U.S. at 37-38 (Scalia, J., concurring) (citing cases setting forth the injury-accrual rule), the *lower* federal courts have been "'apply[ing] a discovery accrual rule when a statute is silent on the issue,'" *TRW*, 534 U.S. at 27 (quoting *Rotella*, 528 U.S. at 555). They were doing so at the time of *TRW*. *Id.* And, as revealed by this case and a survey of other circuits, most of them are still doing so today.

This Court's review is needed to bring the law in the federal courts of appeals back into line with this Court's precedent and the background injury-accrual rule against which Congress legislated. As advocated in the concurring opinion in *TRW*, this Court should reconfirm "the rule that a statute of limitations [on a federal cause of action] begins to

run when the cause of action is complete," absent contrary indications in the statute. 534 U.S. at 39 (Scalia, J., concurring). The discovery accrual rule that now (outside the Fifth Circuit) largely defines the circuit landscape is a "bad wine of recent vintage," *id.* at 37 (Scalia, J., concurring), and this Court's authoritative correction is warranted.

A. The Court Of Appeals' Enforcement Of A Default Discovery-Accrual Rule Conflicts With This Court's Longstanding Precedent.

1. The Copyright Act provides that infringement claims must be brought "within three years after the claim accrued." 17 U.S.C § 507(b). The Act does not specify whether the accrual date runs from the time of injury (the date that infringement occurs) or from the time of discovery (the date that the plaintiff learned or reasonably should have learned of the infringement). The court of appeals held that when, as here, Congress has not specified the accrual date for a federal statutory claim, the default rule is that the claim accrues at the time the injury is discovered or should have been discovered. App., *infra,* 16a.

The court of appeals' adoption and application of that default discovery-accrual rule squarely conflicts with this Court's precedent. This Court has repeatedly admonished that, unless Congress directs otherwise, "*the standard rule*" governing accrual of federal statutory claims is that "the limitations period commences when the plaintiff has 'a complete

and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)) (emphasis added). This "standard rule" for gauging the time of accrual has deep roots, dating back more than a century to *Clark v. Iowa City,* 87 U.S. 583 (1875), which stated that "[a]ll statutes of limitations begin to run when the right of action is complete," *id.* at 589.

The rule's modern pedigree remains strong – the Court has reconfirmed that standard rule twice within the last four years. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (applying standard rule and holding that plaintiff's false arrest claim under 42 U.S.C. § 1983 accrued "as soon as the allegedly wrongful arrest occurred"); *Graham County Soil & Water Conserv. Dist. v. United States* ex rel. *Wilson*, 545 U.S. 409, 418, 419 (2005) (applying standard rule and holding that plaintiff's retaliation claim under False Claims Act accrued when retaliation occurred).

Under this Court's standard injury-accrual rule, a cause of action becomes "complete and present," and hence accrues, when "the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201; *see also TRW*, 534 U.S. at 37 (Scalia, J., concurring) ("[A] statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief.'") (quoting H. Wood, Limitation of Actions § 122a at 684 (4th ed. 1916)). And the time that a plaintiff "can file suit and obtain relief" is the moment when the defendant's actions cause the plaintiff a legally cognizable injury. *See Wallace*,

549 U.S. at 391 ("Under the traditional rule of accrual ... the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable.") (internal quotations omitted); *Bay Area Laundry*, 522 U.S. at 201 (plaintiff's claim under federal statute addressing employer withdrawal from pension funds accrued when the defendant missed the statutorily required payment); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff's business."); *Rawlings*, 302 U.S. at 98 (applying the standard rule to claim under federal banking law).

Unlike the discovery rule adopted by the Third Circuit here, this Court's 130-year-old default injury-accrual rule is consonant with the animating purpose of statutes of limitations. First, both the injury-accrual rule and limitations periods foster the diligent prosecution of claims and encourage plaintiffs promptly to investigate their rights and not sleep on them. *United States v. Kubrick*, 444 U.S. 111, 123 (1979). Second, by requiring plaintiffs to bring suit within a specified period of time, both limitations periods and the standard injury rule provide repose and stability, while protecting potential defendants against the difficulties of defending against "stale claims." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944). Third, statutes of limitations, undergirded by the injury accrual rule, promote the

integrity of the litigation process by ensuring that "the search for truth [is not] seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, [or] disappearance of documents." *Kubrick*, 444 U.S. at 117. Fourth, statutes of limitations are intended to anchor the expectations of potential litigants in a set of consistent and settled rules, and thereby create certainty and uniformity in the administration of justice. *See Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The discovery rule endorsed by the Third Circuit here, by contrast, undermines each of those principles.[3]

2. Contrary to the court of appeals' supposition (App., *infra*, 16a), nothing in this Court's decision in *TRW* "require[d]" it to apply a default discovery-accrual rule. In fact, in *TRW* this Court expressly *rejected* the Ninth Circuit's holding "that a generally applied discovery rule controls this case." 534 U.S. at 28. In so holding, the Court emphasized that it had historically limited application of the discovery rule of accrual to the special circumstances of cases involving fraud, latent disease, and medical malpractice. *Id.* at 27 (citing cases); *see also id.* at 37-38 (Scalia, J., concurring). Consistent with a century of precedent, the Court then held that the

---

[3] The limitations period on a federal statutory claim that has accrued is generally subject to equitable tolling. *See Young v. United States*, 535 U.S. 43 (2002); *see also Wallace*, 549 U.S. at 388-389 (noting distinction between accrual and tolling). The court of appeals did not rest its decision on equitable tolling principles.

standard injury-accrual rule governed claims under the Fair Credit Reporting Act. *Id.* at 28-34.

The Court's rejection in *TRW* of a default discovery rule was reconfirmed by the Court's subsequent decisions again applying the injury-accrual rule in *Graham County* (545 U.S. at 418), in 2005, and *Wallace* (549 U.S. at 388), in 2007. The Third Circuit's decision here thus is in irreconcilable conflict with this Court's precedent.

B. The Third Circuit's Default Discovery-Accrual Rule Conflicts With The Fifth Circuit's Adoption Of A Default Injury-Accrual Rule

The Third Circuit's adoption and application of its default "federal discovery rule," App., *infra*, 16a, squarely conflicts with the Fifth Circuit's recent adoption of a default injury-accrual rule for federal statutes of limitations.

In *Frame v. City of Arlington*, No. 08-10630, 2009 WL 1930045 (5th Cir. July 7, 2009), the Fifth Circuit addressed when a claim arises under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.* Because the statutory text is silent, the Fifth Circuit resorted to this Court's standard default rule that "[a] claim ordinarily accrues when a plaintiff has a complete and present cause of action or, stated differently, when the plaintiff can file suit and obtain relief." 2009 WL 1930045 at *6 (quoting *Wallace*, 549 U.S. at 388, and *Bay Area Laundry,* 522 U.S. at 201 (internal

quotations omitted)). The Fifth Circuit emphasized that "[t]he United States Supreme Court has declined to adopt a general federal discovery rule," and "has limited its own use of the discovery rule to cases alleging fraud or medical malpractice." *Id.* at *7 (citing *TRW*, 534 U.S. at 27); *see id.* (citing *TRW*, 534 U.S. at 37 (Scalia, J., concurring). Because ADA violations are not inherently "latent," like medical injury or malpractice claims, the Fifth Circuit held – in direct opposition to the default rule adopted by the Third Circuit here – that the default injury-accrual rule governed the federal statutory claim. *Frame*, 2009 WL 1930045 at *7.

Other courts of appeals, however, have (like the Third Circuit) overlooked this Court's consistent precedent and enforced a default discovery-accrual rule. *See, e.g.*, *Guilbert v. Gardner*, 480 F.3d 140, 148 (2d Cir. 2007) (applying a default time of discovery rule to an ERISA claim); *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007) (applying a default time of discovery accrual rule to a copyright claim); *Porter v. Ray*, 461 F.3d 1315, 1323 (11th Cir. 2006) (applying a default time of discovery accrual rule to a Section 1983 claim); *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 801 (7th Cir. 2008) (applying a default time of discovery accrual rule to a RICO claim). As the Third Circuit noted, a number of courts of

appeals have applied their default time of discovery accrual rule to Copyright Act claims.[4]

Two courts have recognized *Wallace*, and cited it for the correct proposition that accrual of claims under federal statutes occurs as soon as the plaintiff has a complete cause of action. Yet, both inexplicably went on to cite and apply pre-*Wallace* circuit court precedents holding that a default time of discovery accrual rule governs as a general matter, without explaining their departure from this Court's precedent. *See Greenwood v. New Hampshire Pub. Utils. Comm'n*, 527 F.3d 8, 14 (1st

---

[4] *See* App., *infra*, 15a (citing *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC*, 477 F.3d 383 (6th Cir. 2007); *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004); and *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938 (8th Cir. 2007)). The court of appeals also cited (App., *infra*, 15a) *Lyons Partnership v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001); *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir. 1995); and *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992), all of which were decided before *TRW*, and none of which addresses the issue of which default accrual rule to apply. The only case cited by the court of appeals that does address the issue, *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004), applied the discovery rule by analogy to the fraudulent concealment doctrine, a rationale expressly rejected in *TRW*, 534 U.S. at 27. The sole case cited by the court of appeals that mentions *TRW* is *Warren Freedenfeld Associates v. McTigue*, 531 F.3d 38 (1st Cir. 2008), which noted that, in the wake of *TRW*, a "smattering" of judges and commentators questioned the vitality of the discovery rule in copyright infringement cases, but declined to decide the issue, *id.* at 46 n.3.

Cir. 2008); *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007).

Other courts have expressed confusion about *TRW*'s meaning, without resolving which default accrual rule to apply, *e.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1114 n.3 (10th Cir. 2002), or have misread it as condoning use of the discovery rule when a statute is silent as to congressional intent, *Skwira v. United States*, 344 F.3d 64, 82 (1st Cir. 2003).

Highlighting the divide between, on the one hand, this Court's century of precedent and the Fifth Circuit's default injury rule and, on the other hand, the contrary circuit law misapprehending *TRW* is the Ninth Circuit's recent decision in *Mangum v. Action Collection Service, Inc.*, No. 08-35191, 2009 WL 2367157 (9th Cir. Aug. 4, 2009). As previously noted, this Court reversed the Ninth Circuit's application of a default discovery-accrual rule in *TRW*. Yet, in *Mangum*, the Ninth Circuit resurrected its "general federal rule ... that a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* at *3. In so holding, the Ninth Circuit ignored the *Clark-Wallace* line of cases establishing the standard injury-accrual rule, and explained that *TRW* was simply "food for thought" and "worth musing on." *Id.* at *4.

C. The Question Of What Accrual Rule Governs Federal Statutory Claims Is

Important And Frequently Recurring

Given the persisting and expanding gap between this Court's precedent and the rule of law enforced in the courts of appeals – other than the Fifth Circuit – only this Court's intervention can bring needed clarity to federal law governing the default rule for accrual of federal statutory claims. Such clarity is needed not only for litigants, but also for Congress, which now faces a cacophony of background rules against which it must legislate. *Cf. Graham County*, 545 U.S. at 418 (noting that Congress has long operated against the backdrop of the standard rule that federal claims accrue at the time of injury).

Furthermore, while Congress could protect itself prospectively, the sheer number of already-existing federal statutes giving rise to causes of action testifies to the importance and common recurrence of the question presented. *See Kubrick*, 444 U.S. at 125 (limitations periods are "as ubiquitous as the statutory rights ... to which they are attached or are applicable"). Only this Court can provide the certainty that statutes of limitations are intended to engender by confirming that, in the absence of contrary direction from Congress, claims under federal statutes accrue when the plaintiff suffers the injury that forms the basis of the claim.

Moreover, this case, which involves a claim under the Copyright Act, presents a proper framework for reconfirming that federal statutes of limitations are presumptively subject to an injury-accrual rule. Congress enacted the Copyright Act's

statute of limitations with the background knowledge that, by their very nature, copyright infringement claims involve the defendant's distribution of the plaintiff's work, which commonly is a public act. *See Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 244-246 (S.D.N.Y. 2004) ("[A]t the [legislative] hearings, it was pointed out that 'copyright infringement by its very nature is not a secretive matter.' ... To the contrary, it is 'an act which normally involves the general publication of the work or its public performance.'") (quoting *Copyrights - Statute of Limitations: Hearing on H.R. 781 Before the House Comm. on the Judiciary, Subcomm. 3*, 84th Cong. at 11, 51 (1955)).

Furthermore, application of a discovery rule in this context could have a chilling effect on speech and creative endeavors because authors could well be deterred from publishing their works if they faced open-ended liability for infringement – both temporally, and with respect to the innumerable variety of authors who might someday complain that a particular work contains some small amount of previously copyrighted material. This case is a perfect illustration. The events underlying respondent's claim predate petitioner USI's acquisition of the Flanigan firm; indeed, they predate even USI's creation. The Third Circuit's legal rule requiring speakers to anticipate potential liability arising from publications for more than a decade creates such a significant prospect of overhanging liability that communication will inevitably be stifled.

Enforcement of this Court's standard injury-accrual rule, by contrast, would encourage copyright holders to police use of their works and could engender the more liberal granting of licensing rights to aspiring artists, furthering creative and technological advancement. *See* Note, *Discovering Injury? The Confused State of the Statute of Limitations for Federal Copyright Infringement*, 17 Fordham Intell. Prop. Media & Ent. Law J. 1125, 1164 (2007).[5]

Application of the injury accrual rule in the copyright infringement context is substantially supported by Congress's purpose in adding a statute of limitations to the Copyright Act: to establish a concrete and uniform timeframe in which to bring copyright infringement claims. At that time, in 1957, the Act's limitations period was otherwise subject to state law and thus vulnerable to manipulation through forum shopping. *See Auscape Int'l*, 409 F. Supp. 2d at 244-246. But notably the applicable state laws all employed the injury rule of accrual, and there is no indication that Congress intended to so dramatically depart from that uniform trigger for instituting suit.

---

[5] The court of appeals' reliance (App., *infra*, 17a-18a) on the Copyright Act's use of the term "accrues" rather than "arises" was misplaced. Just as a cause of action "arises" "when a party has a right to apply to a proper tribunal for relief," *Black's Law Dictionary* (6th ed. 1990), a cause of action "accrues" "when a suit may be maintained thereon," *id.*

Indeed, as the leading copyright treatises have notably concluded in supporting recognition of the injury rule, such a change would have run counter to Congress's goal of increased certainty to have adopted an open-ended discovery rule. *Id.* at 246-247; *see also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05, at 12-150.4, 12-150.8[B][2] (2009) (citing *Auscape*, *supra*, as "the best articulation to date of how to compute the Copyright Act's statute of limitations," and urging the federal courts of appeals to follow its lead); 5 William F. Patry, *Patry on Copyright* § 20:20 (2008) (lauding the *Auscape* court's "extremely thorough and well reasoned review of the issues").

The Third Circuit concluded that copyright infringement is an area of law that "cries out" for use of the discovery rule, reasoning that infringement is not always immediately apparent to the copyright owner. App. 22a-23a. But this Court has identified only three areas of the law that "cry out" for use of the discovery rule – fraudulent concealment, latent disease, and medical malpractice – because the very nature of those injuries commonly *prevents* the plaintiff from becoming aware of the injury until some time after the statutory violation occurs. *See TRW*, 534 U.S. at 27 (citing cases). Unlike those types of injuries, copyright infringement does not "cry out" for use of the discovery rule because it is ordinarily public from the outset and nothing in the nature of the act *prevents* the plaintiff from becoming aware of the injury. *See* S. Rep. No. 85-1014 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961, 1962 ("[D]ue to the nature of publication of works of art ... generally the person injured receives

reasonably prompt notice or can easily ascertain any infringement of his rights.").

II. IN THE ALTERNATIVE, THE PETITION SHOULD BE HELD PENDING THIS COURT'S DECISION IN *MERCK & CO. v. REYNOLDS*, NO. 08-905.

This Court's intervention is warranted for a second reason. Assuming the discovery rule applies, *but see* Part I, *supra*, this case presents the same basic question currently pending before this Court in *Merck & Co. v. Reynolds*, No. 08-905. In *Merck*, this Court granted review to decide, for those cases in which the discovery-accrual rule applies (*i.e.*, fraud cases), the point at which plaintiffs have sufficient notice of their potential claims to trigger the running of the statute of limitations.[6]

In *Merck*, the Third Circuit held that the limitations period for a securities fraud lawsuit against a drug-maker who allegedly misled investors regarding the safety of one of its products was not triggered by any or all of the following "storm warnings" of the plaintiffs' claims: (1) public debate

---

[6] The question presented in *Merck* is: "Did the Third Circuit err in holding, in accord with the Ninth Circuit but in contrast to nine other Courts of Appeals, that under the 'inquiry notice' standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation." Petition for a Writ of Certiorari at i, *Merck & Co. v. Reynolds*, No. 08-905 ("Merck Pet.").

surrounding the safety of that product, (2) an FDA Warning Letter admonishing the drug-maker for disseminating allegedly misleading safety information in connection with the product, (3) a statement by the president of the drug-maker's research laboratories that the product could cause heart attacks, and (4) the filing of product liability and consumer fraud lawsuits against the drug-maker based on the drug-maker's alleged failure to warn consumers of the alleged dangers of the product. 543 F.3d at 165-72. In its wholesale rejection of the relevance of those "storm warnings" to the accrual of the cause of action, the Third Circuit held that only evidence establishing the precise elements of the statutory claim – which, in *Merck*, included scienter – is sufficient to accrue a cause of action under the discovery rule.

In this case, the Third Circuit applied its decision in *Merck* and, in particular, its rule – now under review by this Court – that only notice of the exact elements of a claim provides sufficient discovery of a claim to trigger the statute of limitations. App., *infra*, 30a (citing *Merck*, 543 F.3d at 164). Relying on the *Merck* rule, the court here held that respondent's claim was not time-barred under the discovery rule because the multiple warnings of USI's alleged infringement that the Graham Company received did not establish each precise element of the copyright claim. *Compare* App., *infra*, 25a-33a, *with Merck*, 543 F.3d at 165-72. Those storm warnings included evidence that: (1) Haughey had respondent's copyrighted works in his possession when respondent terminated him in the fall of 1991; (2) Haughey failed to return the works

when he was terminated; (3) Haughey's only purpose for having those works was to copy and use them; (4) Haughey joined a competitor of respondent after being terminated; and (5) after Haughey's departure, respondent caught him soliciting respondent's clients in violation of his employment and termination agreements with respondent. App., *infra*, 12a-13a, 48a-59a. Governed by its *Merck* decision, the Third Circuit in this case completely discounted that evidence because it did not furnish specific evidence of each element of respondent's infringement claim. *Id.* at 25a-33a.

Furthermore, as in *Merck*, this case would likely have been decided differently had it been litigated in a different circuit. For instance, under the Second, Fourth, Fifth, Eighth and Eleventh Circuits' "storm warnings" approach, respondent's knowledge of Haughey's prior misconduct and his continued access to the copyright materials would likely have triggered the running of the limitations period at the time of infringement, because such knowledge would have prompted a reasonable copyright holder to investigate whether Haughey was infringing. Similarly, in the circuits applying the investigation approach, a court would likely have held that a timely investigation would have uncovered Haughey's infringement well before February 9, 2002.

Although *Merck* was a securities fraud case, the Third Circuit's opinion in this case relied heavily on its earlier decision in *Merck* and other securities fraud cases in analyzing the inquiry-notice issue, confirming that the Third Circuit applies a single

inquiry-notice standard – the *Merck* standard – to determine when a discovery-accrual rule has been triggered. *See* App., *infra*, 25a-33a (applying *Merck* to conclude that evidence of Haughey's wrongdoing did not constitute storm warnings of his copyright infringement).

Accordingly, this Court's decision in *Merck* is likely to cast relevant light on the court of appeals' application of its discovery-accrual rule in this case. In the event the Court does not review the first question presented, the petition should be held pending this Court's disposition of *Merck* and disposed of in light of the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented or alternatively held pending this Court's decision in *Merck & Co. v. Reynolds*, No. 08-905, and disposed of in light of the Court's decision in that case.

Respectfully submitted,

FLOYD ABRAMS
SUSAN BUCKLEY
CAHILL GORDON &
REINDEL LLP
80 Pine Street
New York, NY 10005

THOMAS C. GOLDSTEIN
Counsel of Record
PATRICIA A. MILLETT
L. RACHEL HELYAR
MICHAEL C. SMALL
AKIN GUMP STRAUSS
HAUER &FELD, LLP
1333 New Hampshire
Avenue., NW
Washington, DC 20036
(202) 887-4000

August 28, 2009

Blank Page