Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 17 *Volume XVII*
Number 4 *Volume XVII Book 4*

Article 7

2007

Discovering Injury? The Confused State of the Statute of Limitations for Federal Copyright Infringement.

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INTRODUCTION 1127

I. PRE-*TRW*: MUCH SIMPLER TIMES?.....1129

A. PRE-TRW*: NON-COPYRIGHT INFRINGEMENT CAUSES OF ACTION WHERE THE STATUTE REMAINS SILENT*.....1129

B. PRE-TRW*: THE RULE OF ACCRUAL FOR SUITS BROUGHT UNDER THE COPYRIGHT ACT* 1131

1. The Second Circuit 1132
2. The Ninth Circuit 1133

II. *TRW*: THE RULE OF ACCRUAL WHEN THE STATUTE REMAINS SILENT?.....1135

III. AFTERMATH OF *TRW* 1137

A. POST-TRW*: NON-COPYRIGHT INFRINGEMENT CAUSES OF ACTION*.....1138

B. POST-TRW*: THE RULE OF ACCRUAL FOR COPYRIGHT INFRINGEMENT* 1142

1. The Second Circuit 1142
2. The Ninth Circuit 1146
3. The Sixth Circuit.....1147

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IV. WHICH RULE IS PROPER? 1148

A. APPLICATION OF TRW *BY COURTS: WHAT DOES* TRW *STAND FOR AND WHAT SHOULD IT STAND FOR?*.....1148
1. The Ninth Circuit's Erroneous Interpretation.....1148
2. The First Circuit's Interpretation: The Narrow *TRW*.....1149
3. The Second Circuit's Interpretation: The Broad *TRW*.....1150
4. The Proper Application of *TRW* 1150

B. STATUTORY INTERPRETATION AND LEGISLATIVE INTENT: HOW SHOULD COURTS INTERPRET THE COPYRIGHT AMENDMENT OF 1957? 1152

C. POLICY CONSIDERATIONS: SHOULD POLICY DICTATE WHICH RULE APPLIES TO COPYRIGHT INFRINGEMENT? 1153
1. Fairness to the Defendant.....1154
a) Providing Repose for Defendants 1154
b) Promoting Accuracy in Evidence 1155
c) Preventing Plaintiff Misconduct 1155
i. Fraud 1155
ii. Diligence on the Part of the Plaintiff 1156
iii. Leveling the Playing Field..... 1158
2. Efficiency Concerns.....1159
a) Reduction of Costs..... 1159
b) Clear Dockets..... 1160
c) Simple Judicial Determinations..... 1161
3. Institutional Legitimacy.....1162
4. Policy Conclusion 1163

D. ARE THE GOALS OF COPYRIGHT LAW BETTER SERVED BY A PARTICULAR RULE?.....1163
1. The Injury Rule and the Goals of Copyright Law 1163
2. The Discovery Rule and the Goals of Copyright Law 1164

V. CONCLUSION.....1165

INTRODUCTION

A world famous artist decides to compose a comic book. He has little interest in creating his own original superhero, so he elects to create five new stories about Superman.[1] The artist creates these new comic books, yet he does not make copies of his compositions, and neglects to inform the owner of the Superman copyright, DC Comics, of his undertaking. The artist instead sells his takes on Superman comic books to five friends, each of whom pay $10,000 for their very own original Superman composition.

Five years later, the artist finds he can no longer paint or draw due to arthritis. Upon learning of this unfortunate change in circumstance, one of the artist's friends elects to sell his comic book, reasoning that he can now reap a large profit from the sale since the artist can no longer draw and the comic book is truly one of a kind. The friend auctions off the comic book on eBay,[2] making a profit of $500,000. This windfall piques DC Comics' attention, and the comic book company sues the artist for copyright infringement.

DC Comics faces a problem.[3] Statute precludes lodging a claim of copyright infringement "unless it is commenced within three years after the claim accrued."[4] However, the Discovery and injury rules impose divergent standards governing the juncture at

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1 *See, e.g.*, Jerome Siegel & Joe Schuster, *Superman*, ACTION COMICS 1, at 1 (Detective Comics, Inc. June 1938) (first appearance of Superman), *reprinted in* SUPERMAN IN ACTION COMICS ARCHIVES, VOLUME ONE 11 (Bob Kahan ed., DC Comics 1997), *available at* http://superman.ws/tales2/action1/?page=1 (last visited Mar. 22, 2007). Citation format adopted from the Fordham Intellectual Property, Media and Entertainment Law Journal. Britton Payne, *Comic Book Legal Citation Format*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1017–19 (2006).

2 eBay is an electronic auction website that allows individuals to sell goods to other individuals via the Internet. *See* eBay Home Page, http://www.ebay.com.

3 DC Comics could possibly sue the artist for the sale involving the eBay auction. *See* 17 U.S.C. § 106 (2000). Under the Copyright Act, unlicensed distribution of copyrighted material is a cause of action. *See id.* Distribution of any copy not "lawfully" made can be subject to a civil claim and in our case, the comic books were unlawfully made. *See* 17 U.S.C. § 109(a) (2000). The problem discussed herein lies with DC Comics ability to recover for the initial sale.

4 17 U.S.C. § 507(b) (2000).

which claims begin to accrue.[5] Depending on which rule applies, the statute of limitations may not have expired, thus DC Comics may still be able to take legal action against the artist.

Under the discovery rule, accrual does not commence until "a plaintiff knows of the infringement or is chargeable with such knowledge,"[6] but under the injury rule, a cause of action accrues at the time infringement occurs.[7] In the aforementioned situation, if the federal statute of limitations for copyright infringement is subject to the injury rule and the claim accrued five years ago, DC cannot bring a case against the artist.[8] If the statute of limitations is subject to the discovery rule, however, DC could still initiate proceedings so long as it did not know and could not have known of the infringement until it learned of the eBay auction.[9]

The statute of limitations pertaining to copyright infringement actions is representative of a more pervasive problem that plagues certain federal statutes addressing time limits on filing claims. As with copyright infringement legislation, many federal laws remain silent with respect to which rule of accrual applies in a given situation. Consequently, when a federal statute remains silent on which rule of accrual is applicable, federal courts adopt a per se discovery rule.[10] The United States Supreme Court's 2001 decision in *TRW, Inc. v. Andrews*[11] fundamentally altered the rules regarding when certain accrual rules applied in the context of federal statutes of limitations, and left causes of action like copyright infringement in limbo.[12]

This Note seeks to answer the question of which accrual rule should apply in the context of copyright infringement litigation.

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5 *See* Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235, 242–43 (S.D.N.Y. 2004); *see also* Stephen M. Kramarsky, *Running out the Clock*, N.Y. L.J., Mar. 28, 2006, at col. 1.

6 Bridgeport Music, Inc., v. Diamond Time, Ltd., 371 F.3d 883, 889 (6th Cir. 2004).

7 *Auscape Int'l*, 409 F. Supp. 2d at 242.

8 *See* 17 U.S.C. § 507(b).

9 *See generally* Roley v. New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994) (denying recovery for alleged infringement discovered and not sued upon with statute of limitations).

10 *Id.* at 27.

11 534 U.S. 19 (2001).

12 *Id.* at 35.

Part I addresses the status of the law governing both federal statutes of limitations in general and for copyright infringement prior to the Supreme Court's *TRW* decision. Part II analyzes the Supreme Court's *TRW* decision in depth and assesses its holding in this pivotal case. Part III first examines how courts have addressed causes of action with unclear accrual rules outside of the realm of copyright in the wake of the Supreme Court's *TRW* decision, and then considers judicial treatment of copyright infringement cases subsequent to *TRW*, illuminating the differences. Part IV, through statutory interpretation and examination of policy arguments for statutes of limitations both in general and with respect to copyright in particular, reaches a determination that the discovery rule is the appropriate rule of accrual in the context of copyright infringement litigation. Part V concludes with a recommendation on how courts should employ the discovery rule when addressing statute of limitations concerns in future copyright infringement actions.

I. PRE-*TRW*: MUCH SIMPLER TIMES?

Prior to the Supreme Court's 2001 *TRW* decision, a modicum of uniformity existed with regard to which rule of accrual in the context of federal statutes of limitations, despite the law's statutory silence on the issue. The statute of limitations rules for copyright infringement actions were largely uniform, but some notable exceptions nonetheless existed.

A. Pre-TRW: Non-Copyright Infringement Causes of Action Where the Statute Remains Silent

Federal law typically neglects to define when the statute of limitations starts to accrue for a given cause of action.[13] The Racketeer Influenced and Corrupt Organizations Act ("RICO"), for example, unambiguously states that civil actions brought under this legislation are subject to a statute of limitations of four years duration.[14] The point at which the clock starts to run on this four-year time period, however, is another matter altogether. The

[13] *See id.*

[14] *See* Rotella v. Wood, 528 U.S. 549, 553 (2000).

Supreme Court wrestled with the question of which rule of accrual applies in the civil RICO context in *Rotella v. Wood*.[15] In *Rotella*, the plaintiff brought a civil RICO case against a group of physicians, alleging the doctors conspired to keep him at a psychiatric facility for their own financial interest rather than his own best interest.[16] Doctors placed Rotella in the Brookhaven Psychiatric Pavilion in 1985 and discharged him in 1986.[17] In 1994, the parent company of the facility pled guilty to fraud and "illegal agreements between the company and its doctors."[18] In 1997, Rotella learned of this plea agreement and brought a civil claim under RICO against the physicians.[19] Rotella, however, had failed to bring an action in 1986 when his alleged injury occurred.[20] While the Supreme Court acknowledged that the discovery rule is presumptively applicable when a federal statute is silent, it declined to extend its holding into a "pattern discovery rule," deeming that such an extension would go against the purpose of a statute of limitations.[21]

Connors v. Hallmark & Son Coal Co.[22] also recognized the validity of the discovery rule. In this case, union trustees sued for money lost due to the company's underreporting of hours worked and coal produced from 1977 through August 1979.[23] The trustees requested documents and audited Hallmark.[24] After the trustees completed their second audit on March 15, 1984, they learned that Hallmark had failed to pay approximately $70,000.[25] The trustees then brought a breach of contract claim on March 3, 1987.[26] The presiding court acknowledged "at least eight federal courts of

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15 *Id.*

16 *Id.* at 551 n.1.

17 *Id.* at 551.

18 *Id.*

19 *Id.*

20 *Id.* at 558–59.

21 *Id.* at 555–56. The "pattern discovery rule" would dictate that the statute of limitations does not begin for a RICO civil claim until the plaintiff knew or should have known of the *conspiracy*, not just the single act. *Id.* at 553.

22 935 F.2d 336 (D.C. Cir. 1991).

23 *Id.* at 337.

24 *Id.*

25 *Id.*

26 *Id.*

appeals have, within the last four years, agreed . . . that the discovery rule is the general accrual rule in federal courts."[27] The court added that in federal question cases, most states adopt the standard that absent an expressed directive from Congress indicating otherwise, the discovery rule should apply.[28]

In the context of *Rotella*, the question of whether the injury or discovery rule applied was of little consequence, because the time period between the accrual and the initiation of the case exceeded the time frame either rule established.[29] In *Hallmark*, however, the decision regarding which rule of accrual should apply was crucial to the trustees' ability to sustain their claim. Adoption of the injury rule would have required the plaintiffs to bring the cause of action within three years of Hallmark's misrepresentation of its funds, before August 1982.[30] Use of the discovery rule, however, allowed the Trustees to bring their claim without fear of preclusion.[31]

*B. Pre-*TRW*: The Rule of Accrual for Suits Brought under the Copyright Act*

Before *TRW*, the rule of accrual for the federal statute of limitations in copyright infringement actions was relatively uniform, yet nonetheless harbored its share of competing views.[32] Although there appeared to be a split within the Ninth Circuit prior to *TRW* regarding which rule of accrual was appropriate in the context of copyright infringement cases, the Second and Ninth Circuits generally agreed that the discovery rule should apply in such actions.[33]

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27 *Id.* at 342.

28 *Id.* (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990)).

29 Rotella v. Wood, 528 U.S. 549, 559 n.4 (2000).

30 *See* Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 337, 341 (D.C. Cir. 1991).

31 *See id.* at 340–41.

32 *See* Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994); Entous v. Viacom Int'l, Inc., 151 F. Supp. 2d 1150, 1154–55 (C.D.C.A. 2001). *But see* L.A. News Serv. v. Reuters Television Int'l, Inc., 149 F.3d 987, 992 (9th Cir. 1998).

33 *Roley*, 19 F.3d at 481; Stone v. Williams, 970 F.2d 1043, 1048 (2d Cir. 1992).

1. The Second Circuit

The Second Circuit maintained that the discovery rule of accrual should apply to statute of limitations questions in copyright infringement actions.[34] In *Stone v. Williams*, Stone, the illegitimate daughter of country-western singer Hank Williams Sr., sued the singer's son for copyright renewals under the Copyright Act of 1976.[35] The Second Circuit held that the plaintiff's cause of action accrued when the plaintiff knew or had reason to know that Hank Williams Sr. was her father.[36] The court determined that Stone could not have known that Hank Williams Sr. was her father until 1979.[37] Even under the discovery rule, the statute of limitations would have barred Stone's suit, which she filed in 1985, were it not for the fact that the alleged infringement was ongoing. Because of the ongoing infringement, however, the court merely precluded Stone from recovering damages from infringement that occurred prior to 1982, three years before Stone filed suit, rather than foreclosing Stone's ability to bring a claim altogether.[38]

In the 1996 case *Merchant v. Levy*, the Second Circuit followed the precedent it established in *Stone*, solidifying its adoption of the position that the discovery rule of accrual should apply in civil claims filed under the Copyright Act of 1976.[39] In *Merchant*, self-proclaimed co-owners of a copyright attempted to assert their rights over those of the plaintiffs, Jimmy Merchant and Herman Santiago.[40] The plaintiffs brought their suit in 1987.[41] The court applied the discovery rule, and held that since the plaintiffs could have known of their ownership rights as early as 1961, the statute of limitations barred their cause of action.[42] Taken together *Stone*

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34 Merchant v. Levy, 92 F.3d 51, 56 (2d Cir. 1996); *Stone*, 970 F.2d at 1048.

35 970 F.2d at 1043.

36 *Stone*, 970 F.2d at 1046, 1047.

37 *Id.* at 1049, 1051.

38 *Id.* at 1051.

39 *Merchant*, 92 F.3d at 56.

40 *Id.* at 53.

41 *Id.*

42 *Id.* at 56. *Merchant* is an interesting case because it deals with continuing infringement. *Id.* In that respect, *Merchant* failed to follow *Stone* and did not allow for any claims of ownership after the statute of limitations ran. *Id.* Much could be said about

and *Merchant* establish the discovery rule as the prevailing rule of accrual for civil claims brought under the Copyright Act of 1976 in the Second Circuit.[43]

2. The Ninth Circuit

Prior to *TRW*, the Ninth Circuit adopted the discovery rule as the standard rule of accrual in cases implicating statute of limitations concerns. Nevertheless, some confusion lingered within the Ninth Circuit, regarding whether the discovery rule was the appropriate rule of accrual to employ in the context of copyright infringement claims.[44] This confusion arose largely from the erroneous citation of a single case: *Roley v. New World Pictures*.[45] Most cases, both before and after *TRW*, and both within the Ninth Circuit and outside of it, cite *Roley* as the standard.[46]

In *Roley*, the author of a screenplay later renamed "Sleep Tight Little Sister" gave the original copy of his screenplay to a friend in 1985.[47] In 1987, the author, Roley, viewed a film this same friend wrote entitled "Sister Sister."[48] Roley concluded that this movie used what was essentially his screenplay. Without any compensation to or consent from Roley, "Sister Sister" aired on television in 1988 and 1992.[49] Roley filed a copyright

continuing infringement and how it affects the statute of limitations under the competing rules of accrual. However, to enter into a discussion of this issue would be tangential to our purposes of determining what rule is appropriate.

[43] Another case that utilized the discovery rule was Margo v. Weiss, 213 F.3d 55 (2d Cir. 2000), which dealt with song infringement.

[44] *See* Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994); Entous v. Viacom Int'l, Inc., 151 F. Supp. 2d 1150 (C.D. Cal. 2001). *But see* L.A. News Serv. v. Reuters Television Int'l, 149 F.3d 987, 992 (9th Cir. 1998).

[45] 19 F.3d 479 (9th Cir. 1994).

[46] Kourtis v. Cameron, 419 F.3d 989, 999 (9th Cir. 2005) (citing *Roley*, 19 F.3d at 481); Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883, 889 (6th Cir. 2004) (citing *Roley*, 19 F.3d at 481); *Reuters*, 149 F.3d at 992 (citing *Roley*, 19 F.3d at 481); Crane Design, Inc. v. Pac. Coast Constr., LLC., 2006 WL 692019 (W.D. Wash) (citing *Kourtis*, 419 F.3d at 999 (citing *Roley*, 19 F.3d at 481)); Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002) (citing *Roley*, 19 F.3d at 481); *Entous*, 151 F. Supp. 2d at 1155 (citing *Roley*, 19 F.3d at 481).

[47] *Roley*, 19 F.3d at 480.

[48] *Id.*

[49] *Id.*

infringement claim on February 7, 1991.[50] The presiding court employed the discovery rule and precluded Roley from recovering damages for infringement in 1987, holding that the statute of limitations accrued in 1987, when Roley first discovered the infringement through viewing "Sister Sister."[51] The court did rule, however, that due to continuing infringement, Roley was free to seek damages for any infringement that occurred on or after February 7, 1988.[52]

Although many courts cite *Roley* as the controlling case on which rule of accrual applies in copyright infringement actions, the Ninth Circuit's analysis rationalizing its decision to apply the discovery rule in *Roley* is nonexistent. The *Roley* court cited two cases that wrestled with question of which rule of accrual should apply in copyright infringement cases implicating statute of limitations concerns, but neither of these cases contain discussions of the discovery rule.[53] Rather, those courts only discuss tolling the statute of limitations through the doctrine of fraudulent concealment.[54] Thus, in deciding *Roley*, the Court of Appeals for the Ninth Circuit created precedent for applying the discovery rule.

In *Los Angeles News Service v. Reuters Television International, Ltd.*, the Ninth Circuit incorrectly cited *Roley* as precedent for using the injury rule, rather than the discovery rule, in determining the rule of accrual for copyright infringement

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50 *Id.* at 481.

51 *Id.*

52 *Id.* This is three years prior to *Roley* bringing the cause of action. *Id.* *Roley* is another continuing infringement case in which the Court chose to follow the *Stone* standard and allow for a cause of action for continuing infringement, not only for the initial accrual period. *Id.*

53 Taylor v. Meirek, 712 F.2d 1112, 1118 (7th Cir. 1983); Wood v. Santa Barbara Chambers of Commerce, Inc., 507 F. Supp. 1128, 1135 (D. Nev. 1980).

54 *See Taylor*, 712 F.2d at 1118; *Wood*, 507 F. Supp. at 1135. Fraudulent concealment is when a prospective defendant takes "active steps" to prevent a plaintiff from bringing a timely suit. Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883, 891 (6th Cir. 2004). An argument could be made that the doctrine of fraudulent concealment helps determine which accrual rule is appropriate. If an injury rule is adopted, fraudulent concealment can serve as a layer of protection for plaintiffs who were unable to bring suit with in the three-year period. A discussion of fraudulent concealment in its entirety is beyond the scope of this paper because fraudulent concealment could not protect against the infringement that DC Comics suffered in our situation.

actions raising statute of limitation concerns.[55] Here, the defendant duplicated and then profited from a copyrighted video of the 1992 Los Angeles Riots, which stemmed from the acquittal of the police officers charged with beating Rodney King.[56] The presiding court ruled that "[a] claim accrues when an act of infringement occurs."[57] Though the question of which rule of accrual applied was factually immaterial in this case, because the plaintiff would not be time-barred from seeking damages under either rule, the court unmistakably applied the injury rule rather than the discovery rule.[58]

Despite the misunderstanding in *Reuters*, the Ninth Circuit plainly adopted the discovery rule as the applicable rule of accrual regarding statute of limitations questions in copyright infringement actions in *Entous v. Viacom International, Inc*.[59] The court addressed the question of whether a contract could trump the statute of limitations and the accrual rule applicable to the statute.[60] Citing *Roley*, the court acknowledged the discovery rule as the appropriate rule of accrual in the context copyright infringement actions raising statute of limitations concerns.[61] The court then held that parties are free to contract to a modified accrual rule and statute of limitations period, as long as the period is reasonable.[62]

II. *TRW*: THE RULE OF ACCRUAL WHEN THE STATUTE REMAINS SILENT?

In the 2001 case *TRW v. Andrews*, the Supreme Court altered the standard for determining the appropriate rule of accrual for a federal statute of limitations when the law is silent on this question.[63] *TRW* involved the Fair Credit Reporting Act ("FCRA"), a piece of legislation that remains silent on the question

55 149 F.3d 987, 992 (9th Cir. 1998).
56 *Id.* at 990.
57 *Id.* at 992 (citing *Roley*, 19 F.3d at 481).
58 *Id.*
59 151 F. Supp. 2d 1150, 1155 (C.D. Cal. 2001).
60 *Id.*
61 *Id.*
62 *Id.* at 1156.
63 534 U.S. 19, 22 (2001).

of which rule of accrual applies to its provisions.[64] The FCRA states that:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of . . .
>
> (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or
>
> (2) 5 years after the date on which the violation that is the basis for such liability occurs.[65]

The plaintiff, Andrews, brought suit under the FCRA against TRW, a credit reporting agency, which disclosed Andrews' credit report on multiple occasions at the behest of an identity thief.[66] TRW released credit reports to other companies at the identity thief's request on July 25, 1994, September 27, 1994, October 28, 1994 and January 3, 1995.[67] Andrews learned of these disclosures on May 31, 1995[68] and filed suit against TRW on October 21, 1996.[69] Because the FCRA imposed a two-year statute of limitations, the two competing rules of accrual—the discovery rule and the injury rule—would yield divergent results on the question of whether the applicable statute of limitations would bar Andrews from seeking damages from the first of the aforementioned disclosures.[70]

The Court held in *TRW* that where no explicit statement regarding the applicable rule of accrual exists in a federal statute, a court must look at the relevant statute to determine if a certain rule should be adopted by implication.[71] While the Court did not definitively rule on whether courts should employ the discovery

64 *Id.*
65 15 U.S.C. § 1681p (2000).
66 *TRW*, 534 U.S. at 24.
67 *Id.*
68 *Id*.
69 *Id*.
70 15 U.S.C. § 1681p; *TRW*, 534 U.S. at 22.
71 *See TRW*, 534 U.S. at 28, 31.

rule whenever federal law is silent on the rule of accrual issue,[72] it did overturn the Ninth Circuit rule that unless Congress expressly states otherwise, courts should apply the discovery rule in such situations.[73] Although the Ninth Circuit had ruled that FCRA was in fact silent on the accrual issue, the Supreme Court agreed instead with the district court, holding that FCRA is not silent on this question.[74] The Court noted that a subsection of the FCRA calls for the application of the discovery rule in actions brought under the FCRA.[75] The relevant provision of the FCRA expressly states that a plaintiff must bring an action within two years of discovery of a violation in order to comport with the FCRA's two-year statute of limitation.[76] The Court applied the principle of statutory construction—that no clause or sentence should be considered void or superfluous—to construe this term as controlling.[77] The Court reasoned that if the general discovery rule applied under the FCRA, the specific provision mandating a two-year discovery rule would be superfluous, and the distinction between the five-year period and the two-year period would be useless.[78] Consequently, the Court held that lower courts must apply the injury rule of accrual to any claim brought under the FCRA unless the statute expressly states otherwise.[79]

III. AFTERMATH OF *TRW*

The Supreme Court's *TRW* decision affected not only the Copyright Act of 1976, but also numerous other federal laws silent on the rule of accrual that applied to their statute of limitations

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72 *Id.* at 27–28.

73 *Id.* at 28. It is important to realize the distinction between a general presumption of a discovery rule and what some Ninth Circuit courts used as the principal for adopting a discovery rule. As seen above, though most cases in the Ninth Circuit appear to just adopt a discovery rule, there is some precedent stating that Congress must expressly state that an injury rule should be used or the courts must apply a discovery rule. *See id.* at 27. *TRW* holds that Congress can implicitly choose what rule to adopt. *See id.* at 28.

74 *Id.* at 28.

75 *Id.*; 15 U.S.C. § 1681p.

76 15 U.S.C. § 1681p(1).

77 *See id.*; *TRW*, 534 U.S. at 31.

78 *TRW*, 534 U.S. at 28.

79 *See id.* at 33.

provision.[80] As addressed *infra*, the question of how much the *TRW* decision has changed the standards for assessing federal statute of limitations questions remains unanswered. While there appears to be little confusion in general regarding the standards courts now employ when adopting rules of accrual, within the context of copyright infringement, various federal courts have reached divergent outcomes when applying the standard the Supreme Court laid out in its *TRW* decision.[81]

*A. Post-*TRW*: Non-Copyright Infringement Causes of Action*

Outside of copyright infringement cases, a consensus appears to exist regarding the circumstances under which courts should employ the *TRW* standard to determine the appropriate rule of accrual for a statute of limitation provision that remains silent on this question.[82] Additionally, outside of the statute of limitations context, lower courts have adopted the *TRW* standard for statutory interpretation purposes.[83] With respect to litigation under the FCRA, for example, lower courts have followed the mandate the Supreme Court set down in *TRW*, holding that the injury rule is applicable rule of accrual for actions brought under this legislation.[84]

In *Claybrooks v. Primus Automotive Financial Services, Inc.*, a Tennessee district court confronted a question similar to that which

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[80] *See, e.g.*, Claybrooks v. Primus Auto. Fin. Serv., Inc., 363 F. Supp. 2d 969, 974–75 (M.D. Tenn. 2005) (applying *TRW*'s analysis to determine rule of accrual for the Equal Credit Opportunity Act); Auscape Int'l v. Nat'l Geographic Soc'y, 409 F. Supp. 2d 235, 244, 246–47 (S.D.N.Y. 2004) (applying *TRW*'s analysis to determine rule of accrual under the Copyright Act).

[81] *See, e.g.*, Crane Design, Inc. v. Pac. Coast Constr., LLC., Not Reported in F. Supp. 2d, No. C05-251RSM, 2006 WL 692019, *4 (W.D. Wash. Mar. 17, 2006) (declining to use *TRW*'s analysis since *TRW* addressed claims under the Fair Credit Reporting Act, not the Copyright Act); *but see Auscape*, 409 F. Supp. 2d at 244, 246–47 (adopting *TRW*'s analysis to determine rule of accrual for the Copyright Act).

[82] *See* Skwira v. United States, 344 F.3d 64, 74 (1st Cir. 2003); *Claybrooks*, 363 F. Supp. 2d at 974–75.

[83] Connecticut v. Spellings, 453 F. Supp. 2d 459, 475 (D. Conn. 2006).

[84] *See, e.g.*, Saraiva v. Citigroup, Inc., Not Reported in F. Supp. 2d, No. 01 CIV 3298 LMM, 2002 WL 227070, *2 (S.D.N.Y. Feb. 13, 2002) (holding that *TRW* has established that a general discovery rule, other than the one specified in the statute, does not apply to Federal Credit Reporting Act).

the Supreme Court addressed in *TRW*, but regarding the Equal Credit Opportunity Act ("ECOA") rather than the FCRA.[85] In *Claybrooks*, multiple plaintiffs filed suit under the ECOA alleging that the defendant, Primus, maintained a discriminatory credit pricing system.[86] While the plaintiffs admitted that Primus first subjected them to this pricing system in 1999, they did not commence their litigation until 2002.[87] Consequently, the district court had to undertake a two-step analysis of the plaintiffs' claims. The court first had to determine the appropriate rule of accrual for the two-year statute of limitations the ECOA established, since the legislation itself remained silent on the issue. Next, using the applicable rule of accrual, it had to ascertain whether the plaintiffs were time-barred from filing suit under the ECOA.[88] The court acknowledged that in the wake of the Supreme Court's decision in *TRW*, no presumption that the discovery rule was the proper rule of accrual existed.[89] The court then looked to the text of the ECOA which states in pertinent part:

> (f) Jurisdiction of courts; time for maintenance of action; exceptions
>
> Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that—
>
> (1) whenever any agency having responsibility for administrative enforcement under *section 1691c* of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,
>
> (2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

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85 363 F. Supp. 2d at 971, 973.

86 *Id.* at 971.

87 *Id.*

88 *Id.* at 973, 977–983.

89 *Id.* at 974–75.

> then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.[90]

After analyzing this portion of the statute, the district court concluded that the ECOA is not silent on the question of the appropriate rule of accrual, and that the phrase "date of occurrence" renders the ECOA's two-year statue of limitations subject to the injury rule of accrual.[91] The court also noted that a provision of the ECOA expressly creates an exception to the applicability of the injury rule.[92] The court concluded that the phrase "except that" in the ECOA explicitly carves out an exception to the general "date of occurrence" rule and simultaneously precludes the applicability of the discovery rule of accrual to the ECOA's two-year statute of limitations.[93]

The First Circuit, however, adhered expressly to the Supreme Court's holding in *TRW* in it addressed the question of which rule of accrual was proper in the context of the two-year statute of limitations contained within the Federal Tort Claims Act ("FTCA").[94] In *Skwira v. United States*, the plaintiffs sued the federal government after a nurse in a Veterans Affairs Medical Center murdered their family member.[95] The death occurred in 1996, a criminal proceeding concluded with the conviction of the nurse in 1998, and the plaintiffs filed their civil suit in 1999.[96] The statute of limitations provision of the FTCA states in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final

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90 15 U.S.C. § 1691e(f) (2000) (emphasis added).

91 *Claybrooks*, 363 F. Supp. 2d at 975, 977 (citing 15 U.S.C. § 1691e(f)).

92 *Id.* at 976.

93 *Id.* at 975–76.

94 28 U.S.C. § 2401(b) (1927); Skwira v. United States, 344 F.3d 64, 74 (1st Cir. 2003).

95 *Skwira*, 344 F.3d at 67.

96 *Id.* at 67, 70.

> denial of the claim by the agency to which it was presented.[97]

The court analyzed FTCA, but in contrast to the statutes and cases discussed *supra*, it concluded that no express provision indicating which rule, or rules, of accrual should apply in the context of the FTCA existed within the legislation.[98] The court ended its analysis of legislative intent with this finding, and moved on to examine other laws in which the discovery rule is the appropriate accrual scheme.[99] The court ultimately held that claims under the FTCA are subject to the discovery rule for statute of limitations accrual purposes,[100] but ruled that the plaintiffs' were nonetheless time-barred from filing claims under the FTCA since they could have filed a claim in 1996, once the autopsy determined that their family member died of unnatural causes.[101]

From these cases, it appears that the question of whether a lower court will apply the Supreme Court's *TRW* rule when interpreting the appropriate rule of accrual for a given statute of limitation hinges upon the text of the legislation at issue. If a statute is truly silent on the question of the appropriate rule of accrual as FTCA is, then courts will apply the discovery rule,[102] but if a statute contains explicit exceptions to a given accrual rule like FCRA and ECOA, courts will employ the injury rule.[103]

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97 28 U.S.C. § 2401(b) (2000).

98 *Skwira*, 344 F.3d at 74 (citing 28 U.S.C. § 2401(b)). The Court points out that the law of torts is a creature of common law and not born from statutes. *Id.* at 74–75.

99 The Court, though finished with *TRW*, continued to assess which rule to adopt. The Court assessed other areas of law where a discovery rule is used such as medical malpractice and latent disease. *Id.* at 73. The Court looked at two reasons that should instruct a court to adopt a discovery rule. *Id.* When it is possible that the plaintiff is left without a remedy due to the cause of action arising after the statutory period and when the nature of the cause of action relies on someone's knowledge, other than the plaintiff's. *See id.*

100 *Id.* at 75.

101 *Id.* at 81.

102 *See id.*

103 For FCRA analysis, see TRW, Inc. v. Andrews, 534 U.S. 19 (2001). For ECOA analysis, see Claybrooks v. Primus Auto. Fin. Servs., Inc., 363 F. Supp. 2d 969 (M.D. Tenn. 2005).

*B. Post-*TRW*: The Rule of Accrual for Copyright Infringement*

The aforementioned uniformity regarding rule of accrual analysis in the wake of the Supreme Court's *TRW* decision, however, has yet to pervade the realm of statute of limitations concerns in copyright infringement actions.[104] A portion of the Second Circuit has adopted the injury rule in the context of such actions,[105] while the Ninth Circuit has in contrast adopted the discovery rule.[106] The Sixth Circuit has adopted the discovery rule as well, using *Roley* as its controlling authority.[107] The Second Circuit, however, appears to be the only circuit that has employed the rule of accrual analysis framework the Supreme Court laid out in *TRW*; the other circuits mention *TRW* only in passing.[108]

1. The Second Circuit

Following the Supreme Court's *TRW* decision, district courts in the Second Circuit opted to continue to adhere to the discovery rule regarding statute of limitations questions in the context copyright infringement actions. In 2004, Judge Kaplan delivered a decision reversing this trend.[109] In 2006, courts in the Southern District of New York decided two copyright infringement cases in which the injury rule prevailed.[110]

In 2002, a court in the Southern District of New York reasserted its desire to apply the discovery rule in *Sapon v. DC Comics*.[111] In 2004, however, Judge Kaplan, also sitting in the

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[104] *See* Auscape Int'l v. Nat'l Geographic Soc., 409 F. Supp. 2d 235, 241–49 (S.D.N.Y. 2004). *But see* Kourtis v. Cameron, 419 F.3d 989, 999–1000 (9th Cir. 2005).

[105] *See Auscape*, 409 F. Supp. 2d at 241–49.

[106] *See Kourtis*, 419 F.3d at 999–1000.

[107] *See* Bridgeport Music, Inc. v. Diamond Time, LTD., 371 F.3d 883, 889 (6th Cir. 2004) (citing Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994)).

[108] *See Auscape*, 409 F. Supp. 2d at 244. *But see* Crane Design v. Pacific Coast Constr., No. C05-251RSM, 2006 WL 692019, at *4 (W.D. Wash. Mar. 17, 2006).

[109] *See* Sapon v. DC Comics, No. 00 CIV. 8992(WHP), 2002 WL 485730, at *5 (S.D.N.Y. Mar. 29, 2002). *But see Auscape* 409 F. Supp. 2d at 241–49.

[110] Kwan v. Schlein, 441 F. Supp. 2d. 491, 499 (S.D.N.Y. 2006); Roberts v. Keith, No. 04 Civ. 10079 (CSH), 2006 WL 547252, at *3 (S.D.N.Y. Mar. 7, 2006) (using the injury rule and citing *Auscape*, 409 F. Supp. 2d at 247).

[111] *Sapon*, 2006 WL 485730 at *5. Sapon sued DC Comics for copyright infringement on his character, the "Black Bat." *Id.* Because the court employed the discovery rule, Sapon could only bring a cause of action for infringement that occurred during or after

Southern District of New York, handed down a decision that may change both the manner in which courts address rule of accrual concerns in the realm of copyright infringement actions and the Copyright Act of 1976 forever.[112] In *Auscape International v. National Geographic Society*, Judge Kaplan adopted the injury rule in place of the discovery rule in a copyright infringement action.[113] In *Auscape*, freelance writers and photographers filed suit against National Geographic over its practice of compiling back issues of its publication in microform and electronic media editions.[114] Judge Kaplan found that any direct infringement on the part of National Geographic occurred on or before 1993,[115] but that ProQuest, another defendant in the case, infringed the plaintiffs' copyrights until 1996.[116] The plaintiffs filed suit on January 31, 2002,[117] asserting that they could not have known of the infringement until the year they commenced their litigation.[118] The plaintiffs' ability to persist with their claims hinged upon the question of which rule of accrual applied to the statute of limitations for copyright infringement actions.[119]

Judge Kaplan commenced his analysis by distinguishing the case at issue from the *Merchant* and *Stone* decisions, holding that those cases dealt with co-ownership of a copyright, rather than infringement.[120] Next, Judge Kaplan acknowledged that while federal courts, as a general rule, had previously applied the discovery rule when a given statute of limitation remained silent on the question of an appropriate complementary rule of accrual, the Supreme Court's ruling in *TRW* fundamentally altered this precedent.[121] Judge Kaplan noted that "*TRW* requires examination

1999. *Id.* Unrelated to the accrual rule issue, Sapon was unsuccessful in all of his claims and was actually found to be the infringing party. *Id.* at *7.

112 *See Auscape*, 409 F. Supp. 2d at 241–249.

113 *Id.*

114 *Id.* at 237.

115 *Id.* at 241.

116 *Id.* at 242.

117 *Id.* at 241.

118 *Id.* at 242.

119 *Id.*

120 *Id.* at 243.

121 *Id.* at 244.

of the statutory structure and legislative history in determining whether a discovery or injury rule should apply . . . ."[122]

While Judge Kaplan observed that the statute of limitations provision in the Copyright Act of 1976 states 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,"[123] his analysis of the statutory text itself ended with this concise reflection. Judge Kaplan reasoned that in contrast to the statute of limitations provision of the FCRA, which the Supreme Court confronted in *TRW*, the statute of limitations clause in the Copyright Act of 1976 contained no exceptions or other alternative provisos that might lead a court to deduce that the legislation's statute of limitations favors one rule of accrual over another.[124] Unlike the *Skwira* court, however, Judge Kaplan did not conclude his analysis at this juncture, but rather delved into an examination of the legislative intent behind the Copyright Act of 1976's statute of limitations clause.[125]

Congress first subjected civil copyright infringement actions to a statute of limitations provision when it amended the Copyright Act in 1957.[126] Judge Kaplan looked at the hearing notes relating to this 1957 amendment in an effort to ascertain Congress' intent in amending the Copyright Act to include a statute of limitations proviso.[127] Judge Kaplan concluded that Congress sought through its 1957 amendment of the Copyright Act to establish a uniform timeframe within which plaintiffs could bring copyright infringement actions, since the Copyright Act was at that time subject to state law and thus vulnerable to manipulation through forum shopping.[128] Judge Kaplan gleaned from the Senate committee notes on the Copyright Act amendment that Congress believed a three-year statute of limitations provided lawful

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122 *Id.*

123 17 U.S.C. § 507(b) (2000); *Auscape*, 409 F. Supp. 2d at 244.

124 *Auscape*, 409 F. Supp. 2d at 244.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 245; Act of Aug. 19, 1957, 1957 U.S.C.C.A.N. 1961, 1961 (discussing the 1957 amendment to the Copyright Act which provided a statute of limitations for civil copyright actions).

copyright holders with a sufficient amount of time to commence legal action following infringement of their copyrights.[129] Judge Kaplan further stated that it appeared from the Senate committee notes that state laws at the time of the 1957 Copyright Act amendment all employed the injury rule for statute of limitations accrual purposes, and that Congress' goal in amending the federal Copyright Act was increased certainty.[130] Employing the discovery rule for statute of limitations accrual calculations in the context of copyright infringement actions, Judge Kaplan noted, would consequently run contrary to the legislative intent behind Congress' 1957 amendment of the Copyright Act.[131] Judge Kaplan concluded his analysis by distinguishing copyright infringement actions from copyright ownership disputes, noting that ownership disputes do not arise until a co-owner of a copyright attempts to exercise exclusive rights over a jointly owned piece of intellectual property.[132] Following his detailed analysis of Congress' historical legislative intent regarding the imposition of a statute of limitations in copyright infringement actions, Judge Kaplan held that the injury rule should apply to statute of limitations accrual tabulations in the realm of copyright infringement actions, and that adoption of this rule barred all of the plaintiffs' claims in the case.[133]

Recent Southern District of New York cases echo Judge Kaplan's holding in *Auscape*.[134] In *Kwan* v. *Schlein*, the court concluded that the case at hand concerned solely an issue of co-ownership of a copyright, and consequently applied the discovery rule.[135] In *Roberts v. Keith*, the court, grappling with an infringement claim, cited *Auscape* and employed the injury rule.[136]

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129 *Auscape*, 409 F. Supp. 2d at 245; 1957 U.S.C.C.A.N. at 1962.

130 *Auscape*, 409 F. Supp. 2d at 245–46.

131 *Id.* at 247.

132 *Id.* The ownership provision is located in a separate section of the Copyright Act. 17 U.S.C. § 201 (2006). Under the Copyright Act, any claim brought is subject to the same statute of limitations. *Id.* at § 507.

133 *See Auscape*, 409 F. Supp. 2d at 247.

134 Kwan v. Schlein, 441 F. Supp. 2d 491, 498–99 (S.D.N.Y. 2006); Roberts v. Keith, No. 04 Civ. 10079 (CSH), 2006 WL 547252, at *3 (S.D.N.Y. March 7, 2006) (using the injury rule and citing *Auscape*, 409 F. Supp. 2d at 247).

135 *Kwan*, 441 F. Supp. 2d at 498–99.

136 *Roberts*, 2006 WL 547252 at *3.

2. The Ninth Circuit

In contrast to the Second Circuit, the Ninth Circuit applies the discovery rule when confronted with statute of limitations accrual questions in the copyright infringement realm.[137] As discussed in Part I(B)(ii) *infra*, however, the Ninth Circuit's misguided citation of *Roley* in *Reuters* produced a slight hiccup in the circuit's jurisprudence on this issue. This irregularity came to a head in 2002, when a district court in the Central District of California, subject to Ninth Circuit review on appeal, cited *Reuters* and applied the incorrect rule of accrual in a copyright infringement action.[138] Application of the appropriate rule of accrual, however, proved inconsequential in this case after the court concluded that the defendants did not infringe on the plaintiffs' copyright.[139]

In 2005, the United States Court of Appeals for the Ninth Circuit held that the discovery rule governs statute of limitations accrual calculations in copyright infringement actions.[140] In *Kourtis v. Cameron*, the plaintiffs filed a copyright infringement claim against the makers of the film *Terminator 2*.[141] The plaintiffs' claim related to the shape shifting ability of the main character in their proposed film, *The Minotaur*.[142] To wit, the lead villain in *Terminator II* possessed the same shape-shifting ability as the main character in *The Minotaur*.[143] The plaintiffs proposed *The Minotaur* to the defendants in 1989, and in 1991 the defendants released *Terminator 2*, which the plaintiffs contended infringed on their copyrighted work.[144] The court, applying the discovery rule for accrual purposes, held that while the statute of limitations barred the plaintiffs from recovering for infringement stemming from the initial release of *Terminator 2*, the plaintiffs remained free to pursue claims relating to any infringement that

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137 Kourtis v. Cameron, 419 F.3d 989, 999 (9th Cir. 2005). *But see* Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002) (citing Los Angeles News Serv. v. Reuters Television Int'l et al., 149 F.3d 987, 992 (9th Cir. 1998)).

138 *Newton*, 204 F. Supp. 2d at 1260.

139 *Id.* at 1260.

140 *Kourtis*, 419 F.3d at 999.

141 *Id.* at 993.

142 *Id.*

143 *Id.*

144 *Id.*

occurred within the three years immediately preceding the filing of their suit.[145] Tellingly, the court never mentioned *TRW* in its decision, but it did cite *Roley*, and did so without conducting a post-*TRW* analysis.[146]

In 2006, the Western District of Washington, subject to the Ninth Circuit for appellate review, followed *Kourtis* in *Crane Design, Inc. v. Pacific Coast Construction, LLC*.[147] In this case the plaintiff, Crane, sued for infringement on the copyrights it held for its building designs.[148] The defendant construction company used Crane's designs in conjunction with buildings they worked on from 2001 into 2003.[149] Crane did not learn of the defendant's infringing use of its designs until a 2003 phone call.[150] The court, citing *Roley* and *Kourtis*, applied the discovery rule and held that since the statute of limitations had not accrued, Crane was free to pursue its infringement claims pertaining to actions the defendant undertook prior to 2003.[151] In contrast to the *Kourtis* court, the *Crane* court acknowledged the Supreme Court's *TRW* ruling, but distinguished the decision as applicable only within the framework of the FCRA, and thus not controlling in the context of cases brought under Copyright Act.[152]

3. The Sixth Circuit

Like the Ninth Circuit, the Sixth Circuit has adopted the discovery rule when calculating statute of limitations accruals in copyright infringement actions in the wake of the Supreme Court's *TRW* decision.[153] In *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, the plaintiff filed suit alleging infringement of music copyrights it held.[154] While the Sixth Circuit never ruled on the question of when the infringement began, it found that the

145 *See id.* at 999–1000.
146 *Id.*
147 2006 WL 692019 (W.D. Wash.).
148 *Id.* at *1–2.
149 *Id.* at *2.
150 *Id.*
151 *Id.* at *4.
152 *Id.*
153 Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883, 889 (6th Cir. 2004).
154 *Id.* at 885–86.

defendants did not engage in any infringement after 1998.[155] Although the court applied the discovery rule, even the accrual calculation tabulated under this method barred the plaintiffs from persisting with their claims.[156] The court did not analyze *TRW*, and instead simply cited *Roley*, a pre-*TRW* case, as the controlling authority on the accrual rule question.[157]

IV. WHICH RULE IS PROPER?

Up to this point, this Note has addressed what has essentially been a battle between two circuits. Both the Second and Ninth Circuits wrestled with federal statutes of limitations that remain silent on the question of which accrual rule applies under their auspices. In the context of the accrual rule applicable in copyright infringement actions, the two circuits are at an impasse. The Second Circuit conducts the most thorough analysis and addresses the Supreme Court's *TRW* decision, while the Ninth Circuit's attention to *TRW* is essentially non-existent.

A. Application of TRW by Courts: What Does TRW Stand For and What Should it Stand For?

The case law splits into three various analyses of the Supreme Court's *TRW* decision and three different interpretations of which accrual rule should apply when a federal state of limitations remains silent on this issue.[158] It is apparent from other court's construal of *TRW* that two of these interpretations are likely more correct than the third.

1. The Ninth Circuit's Erroneous Interpretation

The Ninth Circuit has yet to consider how the Supreme Court's *TRW* ruling applies in the realm of copyright infringement actions. In *Crane*, however, the Ninth Circuit held that the Supreme

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155 *Id.* at 889.

156 *See id.* at 889–91.

157 *Id.* at 889.

158 *See* Kourtis v. Cameron, 419 F.3d 989 (9th Cir. 2005); Skwira v. United States, 344 F.3d 64 (1st Cir. 2003). *But see* Auscape Int'l v. Nat'l Geographic Soc., 409 F. Supp. 2d 235 (S.D.N.Y. 2004).

Court's *TRW* ruling only applied to the FCRA, and does not control in the domain of Copyright Act.[159] The Supreme Court never stated in *TRW* that its analysis of the FCRA should apply in all situations in which a statute of limitations remains silent on the question of the appropriate complementary rule of accrual.[160] Moreover, the Court never rejected the general presumption that the discovery rule applies when a statute of limitation remains silent on the accrual rule question.[161] The Court only held that the Ninth Circuit was wrong to presume that Congress must enact explicit legislation in order to counteract this presumption.[162] While the Supreme Court expressly overruled only one method of assessing accrual rules, the methodology the Supreme Court employed in *TRW* applies to all statutes of limitations that remain silent on the question of which rule of accrual applies under their auspices.[163] Finally, *Roley*, the Ninth Circuit's controlling authority on the question of which accrual applies in the context of copyright infringement when a statute of limitations remains silent on the issue, fails to conduct any analysis whatsoever of why the discovery rule should apply over the injury rule.[164]

2. The First Circuit's Interpretation: The Narrow *TRW*

In *Skwira v. United States*, the First Circuit deferred to the Supreme Court's *TRW* decision, and consequently limited its holding to statutes containing written exceptions to a given accrual rule.[165] The First Circuit in *Skwira* and the Supreme Court in *TRW* employed highly similar analytical methodologies.[166] In *Skwira*,

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[159] Crane Design, Inc. v. Pacific Coast Const., LLC., 2006 WL 692019 at *4 (W.D. Wash.).

[160] *See generally* TRW, Inc. v. Andrews, 534 U.S. 19 (2001) (noting that the FCRA specifies a limited discovery exception in the statute, which implicitly demonstrates Congress' intent to exclude the application of a general discovery rule).

[161] *Id.* at 25–26.

[162] *Id.*

[163] *See generally id.*

[164] *See* Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994).

[165] Skwira v. United States, 344 F.3d 64, 74 (1st Cir. 2003).

[166] *Compare TRW*, 534 U.S. at 31 (enactment of discovery rule as an exception indicates congressional intent to apply injury rule as general rule), *with Skwira*, 344 F.3d (absence of such an exception in the statute permits application of the discovery rule as the general rule).

the First Circuit, after finding no express exceptions in the statute at issue, adopted the general presumption favoring applicability of the discovery rule, which the Supreme Court had yet to reject at that juncture.[167] The First Circuit's narrow interpretation limits analysis in the mold of *TRW* to legislative intent via statutory construction only, and dispenses with examination of legislative committee notes. The First Circuit's treatment of accrual rule questions remains valid because it shares its analytical methodology with the Supreme Court's *TRW* decision, and diverges only in its application of a general rule that the Supreme Court never explicitly overruled.[168]

3. The Second Circuit's Interpretation: The Broad *TRW*

In *Auscape*, a district court in the Southern District of New York, subject to the Second Circuit in the event of appellate review, took its analysis of *TRW* a step further than *Skwira* when it employed committee notes to assess Congress' legislative intent.[169] This Southern District methodology flows logically from the Supreme Court's *TRW* decision, wherein the Court undertook an analysis of Congress' legislative intent in enacting the FCRA before it concluded that Congress intended the injury accrual rule to apply to the FCRA's statute of limitations.[170]

4. The Proper Application of *TRW*

Of these interpretations of *TRW*, the First Circuit's is the most accurate and astute. *TRW* does not resolve the question of which accrual rule applies when a statute of limitations remains silent on the issue.[171] The Supreme Court could have easily rejected the presumption favoring application of the discovery rule outright in

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[167] *Skwira*, 344 F.3d at 75.

[168] *See id*. The Court in *TRW* looked at the statute and then made its decision. There is some dicta referring to legislative intent but that was not part of the Court's analysis. *See TRW*, 534 U.S. at 31–33.

[169] Auscape Int'l v. Nat'l Geographic Soc., 409 F. Supp. 2d 235, 244–47 (S.D.N.Y. 2004).

[170] *TRW*, 534 U.S. at 33 ("As TRW notes, however, Congress also heard testimony urging it to enact a statute of limitations that runs from 'the date on which the violation is discovered' but declined to do so.").

[171] *TRW*, 534 U.S. at 27.

TRW, but it did not go that far.[172] This is not to say that if the Court were to decide a question of the applicable accrual rule for a given statute of limitations they would decline to undertake an *Auscape*-like analysis, but extrapolating the Court's *TRW* holding beyond the limited context in which the decision applies is somewhat presumptuous. If a court were to analyze a statute of limitations silent on the question of an applicable complementary rule of accrual using the *Auscape* methodology, it would flounder if it could not rely on information capable of providing insight into Congress's legislative intent. Additionally, to borrow an argument from *TRW*, adoption of the *Auscape* court's analytical methodology would negate the still-valid general presumption favoring applicability of the discovery rule when a statute of limitations remains silent on the accrual rule question. The Supreme Court plainly did not intend to overrule this general presumption favoring applicability of the discovery rule, for if it did, it would have expressly stated as much, and proffered the analytical framework it employed in *TRW* as the only means of determining the appropriate accrual rule for a given statute of limitation.

While the *Auscape* court's analytical methodology may constitute a well-reasoned extension of the Supreme Court's *TRW* decision, it also contradicts itself. The *Auscape* court suggested that in the context of ownership, rather than infringement, actions brought under the Copyright Act, the discovery accrual rule might still constitute good law.[173] The court, employing a two-pronged analysis of both statutory construction and legislative intent, held that the injury rule of accrual rule applies in the context of copyright infringement actions, yet no provision in the Copyright Act states that the Act's statute of limitations provision treats ownership claims and infringement claims differently.[174] Consequently, the *Auscape* court erred when it stated that the discovery rule might apply to copyright ownership claims, but not to copyright infringement claims. While the *Auscape* court may have over stepped its bounds, however, this does not detract from

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[172] *Id.*

[173] *Auscape*, 409 F. Supp. 2d at 243–44.

[174] 17 U.S.C. § 507 (2000).

the fact that the court's conclusion that the injury rule is the appropriate accrual rule in the context of copyright infringement actions was accurate, or that its detailed analysis of both statutory construction and legislative intent was enlightening.

B. Statutory Interpretation and Legislative Intent: How Should Courts Interpret the Copyright Amendment of 1957?

No room for statutory interpretation exists within the Copyright Act regarding the rule of accrual that applies to the Act's statute of limitations. The *Auscape* court was astute in stating that the text of the Act was "not so illuminating" on the rule of accrual.[175] Room does exist, however, for analysis of Congress' intent regarding the appropriate rule of accrual, and that intent, gleaned through legislative notes, appears to mandate adoption of the injury rule in the context of the Copyright Act's statute of limitations.[176] On the subject of legislative intent, the *Auscape* court made it quite clear that Congress' intent in 1957 was to correct the lack of certainty that pervaded copyright law at the time.[177] Pre-1957 copyright infringement cases clearly indicate the uncertainty that pervaded the relationship between the statute of limitations and copyright law at that time.[178] The ambiguous law governing statute of limitations accrual questions in the context of copyright claims prior to 1957 read: "an action for an infringement is governed by the limitations existing for the class of actions to which it belongs in the state where it is brought."[179] Before 1957, the injury rule appeared to serve as the dominant accrual rule in copyright infringement claims, regardless of the state.[180] Since Congress remained silent on the applicable rule of accrual in 1957, it is

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[175] *Auscape*, 409 F. Supp. 2d at 244.

[176] *See* 1957 U.S.C.C.A.N 1962 ("[D]ue to the nature of publication of works of art . . . generally the person injured . . . can easily ascertain any infringement . . . [t]he committee agrees that 3 years is an appropriate period for a uniform statute of limitations for civil copyright actions and that it would provide an adequate opportunity for the injured party to commence his action.").

[177] *Auscape*, 409 F. Supp. 2d at 245.

[178] *See, e.g.*, Local Trademarks, Inc. v. Price, 170 F.2d 715 (5th Cir. 1948); Pathe Exch., Inc. v. Dalke Universal Film Exchs., Inc., 49 F.2d 161 (4th Cir. 1931).

[179] *Local Trademarks*, 170 F.2d at 717.

[180] *Id.* at 719.

logical to assume that it accepted the status quo at the time: the injury rule.[181] Moreover, Congress remains free to change the statute of limitations provision in the Copyright Act, to mandate application of a specific rule of accrual if it deems such action necessary. Interestingly, few copyright infringement cases implicating accrual of the statute of limitations arose between 1957 and 1976.[182] One case decided during this period adopted the injury rule as the appropriate rule of accrual in the context of the Copyright Act.[183] Until recently, the status quo accrual rule in copyright actions implicating statute of limitations concerns appears to have been the injury rule.

C. Policy Considerations: Should Policy Dictate Which Rule Applies to Copyright Infringement?

Policy considerations offer some insight as to which accrual rule courts should adopt when statute of limitations concerns arise in copyright infringement actions. In *Skwira*, the First Circuit completed its *TRW* analysis without confronting any explicit exceptions within the pertinent statute of limitations that might govern application of a given accrual rule, although the court did address policy concerns when it held the discovery rule was a proper accrual rule in the context of the FTCA.[184] Courts are free to consider policy concerns such as fairness to the defendant,

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[181] *See Auscape*, 409 F. Supp. 2d at 246 (explaining that Congress intended the statute of limitations to run upon infringement and not upon discovery).

[182] *See, e.g.*, Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188 n.12 (2d Cir. 1975) (declining to address statute of limitations as appellee's alternate grounds for dismissal because of court's decision regarding infringement); Telex Corp. v. Int'l Bus. Mach. Corp., 510 F.2d 894, 912 (10th Cir. 1975) (the trial court held that the statute of limitations did not apply "because Telex had fraudulently concealed the fact that they had misappropriated IBM's trade secrets"); Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 339 (5th Cir. 1971) (concluding that the statute of limitations barred plaintiff's action); Smith v. Piper Aircraft Corp., 425 F.2d 823 (5th Cir. 1970) (discussing statutes of limitation and continuing torts); Gordon v. Vincent Youmans, Inc., 358 F.2d 261, 266 (2d Cir. 1965) (statute of limitations issue was not before the court on appeal).

[183] *See* Baxter v. Curtis Indus., Inc., 201 F. Supp. 100, 101 (N.D. Ohio 1962) (holding that the statute of limitations begins to run from the date of the last act of infringement).

[184] *See* Skwira v. United States, 344 F.3d 64, 67, 73–74 (1st Cir. 2003).

efficiency, and institutional legitimacy[185] while weighing which accrual rule is appropriate in the context of the Copyright Act's statute of limitations provision. While Suzette Malveaux addressed policy concerns in the context of statute of limitations questions related to the issue of reparations,[186] applying these same considerations in the realm of the Copyright Act may help illuminate the appropriate accrual rule for copyright infringement litigation.

1. Fairness to the Defendant

Three interests are prominent in ensuring fairness for the defendant: "(1) providing repose for the defendant; (2) promoting accuracy in fact finding; and (3) curtailing plaintiff misconduct."[187]

a) Providing Repose for Defendants

Individuals need certainty and finality.[188] Defendants should not need to concern themselves with the prospect of financial burdens arising from potential lawsuits indefinitely.[189] Returning to the hypothetical case of the artist from the introduction to this Note, one might recall that one of the friends who purchased the artist's interpretation of a Superman comic book became financially unstable 10 years after he purchased the artist's creation and elected to sell the comic on eBay.[190] Application of the discovery rule would not bar DC Comics from commencing copyright infringement litigation against the artist for his original infringement of the company's Superman-related copyrights. Adoption of the injury rule, however, would bar DC Comics from litigating a claim against the artist stemming from his original infringement. It is difficult to fathom that permitting DC Comics to sue the artist twenty years after the date of the original infringement would promote fairness for any defendant. The

185 Suzette Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73–81 (2005).
186 *Id.*
187 *Id.* at 75.
188 *See id.*
189 *Id.* at 76.
190 *See supra* Introduction.

injury rule better serves the interest of offering repose to potential copyright infringement defendants.

b) Promoting Accuracy in Evidence

Promoting accuracy in evidence by requiring a plaintiff to bring his claim as soon as possible constitutes an equally important interest.[191] In the artist hypothetical, the evidence is easily accessible and the certainty of infringement is unquestionable. In most copyright infringement cases, availability of physical evidence of infringement is a non-issue. While in a criminal or personal injury case evidence may degrade or even disappear altogether over time, in a copyright infringement action access to physical evidence of infringement—whether the tangible evidence of infringement is a comic book as in the hypothetical, a song as in *Bridgeport*, or a film as in *Kourtis*—continues indefinitely.[192] Consequently, neither the discovery rule nor the injury rule harms the interest of promoting accurate evidence.

c) Preventing Plaintiff Misconduct

Ascertaining the appropriate accrual for copyright infringement litigation requires analysis of three methods of preventing plaintiff misconduct: "(1) preventing fraud; (2) promoting diligence; and (3) leveling the playing field between the parties."[193]

i. Fraud

Courts can prevent plaintiff misconduct by preventing fraud. They can prevent fraud by proscribing plaintiffs from filing claims premised on evidence that the courts cannot test for accuracy.[194] While neither the discovery rule nor the injury rule unequivocally prevent fraud, the latter rule is better suited to accomplish this aim in that it forces plaintiffs to file claims closer to the date of infringement. Admittedly, a plaintiff could file a claim ten years after an instance of infringement relying on perfectly legitimate

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191 *Id.*

192 *See, e.g.*, Kourtis v. Cameron, 419 F.3d 989 (9th Cir. 2005); Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883 (6th Cir. 2004).

193 *See* Malveaux, *supra* note 185, at 77.

194 *See id.*

evidence, but evidence less than three years old is more likely to be reliable than evidence ten years old. Consequently, imposition of a concrete time frame within which a plaintiff must commence a copyright infringement action under the injury rule might help to prevent instances of plaintiff fraud.

ii. Diligence on the Part of the Plaintiff

Diligence on the part of the plaintiff "stimulate[s] activity and punish[es] negligence."[195] The injury rule forces plaintiffs to remain vigilant of their intellectual property. Sophisticated copyright holders, however, would exhibit diligence regardless of which accrual rule governs copyright infringement actions. Through close monitoring of all transactions related to their copyrights, such parties would likely learn of any infringement shortly after it occurred. Consequently, such parties would possess the knowledge necessary to commence litigation well before the Copyright Act's three-year statute of limitations precluded them from filing claims, regardless of whether the discovery rule or the injury rule controlled accrual calculations.

The prevalence of the Internet further blurs the importance of determining which accrual rule applies in the context of copyright infringement actions. The Internet's precipitation of dramatic increases in both the quantity of information available to diligent copyright holders and the speed of availability has enabled such watchful parties to monitor use of their copyrighted property with relative ease. Under the discovery rule, accrual against a statute of limitations commences once a potential plaintiff knows or should reasonably know of an instance of unlawful conduct.[196] Diligent copyright holders will know, or should reasonably know, of an infringing use as soon as news of such a use appears on the Internet. Consequently, as technology steadily advances, the difference between discovery and injury rule accrual calculations diminishes. Noted legal scholar Lawrence Lessig asserts that in this age of new technology, Digital Rights Management ("DRM")

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[195] *Id.* at 78 (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

[196] *See* Bridgeport Music, Inc., v. Diamond Time, Ltd., 371 F.3d 883, 889 (6th Cir. 2004).

will strictly enforce copyright compliance on the Internet.[197] Lessig fears that as DRM advances and its prominence increases, enforcement of copyrights will become easier and eventually so pervasive that it will destroy the public domain.[198] Lessig raises the specter of expanding, increasingly restrictive copyright laws that will—with assistance from DRM—make it easier for copyright holders to police infringement.[199]

In the hypothetical situation regarding the artist's unauthorized creation of Superman comic books, however, it would have been nearly impossible for even a party as vigilant and sophisticated as DC Comics to learn of the five infringing works until one of them turned up on eBay. Adherence to the injury rule in copyright infringement actions would preclude even the most diligent plaintiffs from commencing litigation premised on the original infringement in such a situation. Even under the injury rule, however, DC Comics could still move to enjoin the artist's friend from proceeding with the eBay auction, and file suit to curtail any subsequent infringement of its Superman copyrights by the artist and those who purchased his works.[200]

The extent of infringement and the likelihood that a lawful copyright holder will discover infringement are highly correlated. As the potential harm from infringement increases, it becomes increasingly likely that a copyright holder will learn of the infringing activity. In the example of the artist's unauthorized creation of Superman comic books, it would be far easier for DC Comics to uncover news of the infringement if the artist sold his five comic books for $500,000 than it would be if the artist sold his creations for $500. The larger the amount of money changing hands, the greater the probability of public knowledge of the transaction, and consequently, the greater the likelihood that the copyright holder will learn of the transaction involving the infringing article.

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[197] Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 62 (2006).

[198] *See id.*

[199] *See id.* at 63.

[200] *See supra* note 3 and accompanying text.

Conversely, as technology advances, it becomes increasingly easy to access copyrighted works intending to violate copyright laws.[201] While the Internet allows diligent plaintiffs to police infringement efficiently, it is impossible to monitor every crevice of the Internet vigilantly, particularly because the Internet only increases in size over time. Since 1976, the level of real world, practical protection against infringement that lawful creators and owners of copyrighted material enjoy has steadily diminished because of the concomittant evolution of computer technology.[202] Application of the injury rule to statute of limitations accrual calculations in the realm of copyright infringement actions would further weaken such protection.[203] Lessig notes that Digital Rights Management technology is not yet widely used , and there is much debate over whether it ever will be.[204] As technology advances, sophisticated and vigilant copyright holders continue to learn of instances of infringement more quickly, which in turn works, from a practical standpoint, to diminish the importance of the difference between the accrual standards of the discovery rule and the injury rule. Technological advancement, however, also makes it more difficult for rights holders to stridently police and protect their copyrights. The more liberal accrual methodology of the discovery rule is more effective than the restrictive injury rule in ameliorating the policing difficulties that technological advancements precipitate.

iii. Leveling the Playing Field

On a truly level litigation playing field, defendants should be able to mount the best defense possible at trial.[205] In order to further such strong defenses, policies must protect unsuspecting potential defendants who unwittingly fail to preserve evidence that

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[201] *See* Britton Payne, *Super-Grokster: Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 947–52 (2006) (discussing the Copyright Act of 1976, its deficiencies in the face of technology, and how it has tried to adapt).

[202] *Id*.

[203] Looking at peer-to-peer sharing software, torrents and Napster-like entities, it becomes apparent that copyright infringement has increased.

[204] Lessig, *supra* note 197, at 63.

[205] Malveaux, *supra* note 185, at 78.

would aid their cause from covertly litigious plaintiffs who amass substantial amounts of evidence before filing suit.[206] As addressed *supra*, most evidence of copyright infringement exists inherently within a given allegedly infringing work. Adoption of one accrual rule over another is immaterial and unrelated to the availability of such tangible evidence of infringement. Litigants, however, rely on additional evidence in order to prove or disprove infringement. When the allegations in a copyright infringement action do not pertain to direct copying, for example, the defendant's access, or lack thereof, to the works the defendant allegedly infringed becomes an important consideration.[207] In such a case, plaintiffs may preserve evidence of the defendant's access to the allegedly infringed works, while unknowing eventual defendants discard evidence disproving such access. Even the issue of such other evidence, however, is irrelevant in weighing which accrual rule to apply, because when plaintiffs preserve evidence of infringement, they simultaneously demonstrate knowledge of infringement, thereby commencing accrual of the statute of limitations under the discovery rule. Consequently, both the injury rule and the discovery rule level the playing field for defendants by discouraging plaintiffs from clandestinely gathering and preserving evidence long before commencing litigation. In the context of a level playing field, the different accrual methods of the two rules are irrelevant.

2. Efficiency Concerns

Courts promote efficiency through reducing costs, clearing dockets, and making judicial determinations simple and easy to decide.[208]

a) Reduction of Costs

Another aim of implementing a statute of limitations is reducing the transaction costs inherent to the process of gathering

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206 *See id.* at 79.

207 Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1248 (11th Cir. 1999).

208 Malveaux, *supra* note 185, at 79.

evidence.[209] As the time span between an instance of infringement and commencement of litigation related to this infringement grows, the transaction costs of gathering evidence necessary for litigation balloon.[210] As discussed *supra*, tangible evidence of copyright infringement is typically not difficult to obtain, so the transaction costs associated with acquiring such evidence are already relatively low. Consequently, adoption of one accrual rule over the other would have little effect on reducing the already low transaction costs associated with gathering evidence in copyright infringement actions.

b) Clear Dockets

Courts also foster efficiency by reducing their heavy caseloads.[211] They achieve this aim through curtailing the proliferation of excessive filings and frivolous claims.[212] While in the example of the artist's infringement of copyrights relating to Superman DC Comics' claims are meritorious, most claims plaintiffs initiate years after an instance of unlawful conduct do not share this distinction. As a general proposition, the greater the time span between allegedly unlawful conduct and the filing of a suit related to such conduct, the greater the likelihood that the claims in the suit are frivolous.[213] Under the discovery rule, plaintiffs can file suit twenty years after an instance of copyright infringement, so long as they first knew or should have known of such infringement no more than three years prior to their commencement of litigation. The discovery rule thus cuts against the aspirations of efficiency inherent in the adoption of a statute of limitations. The injury rule is far better suited to clearing court dockets and inhibiting the filing of frivolous claims, and is therefore more likely to promote efficiency.

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209 *Id.*
210 *Id.*
211 *Id.* at 79–80.
212 *Id.* at 80.
213 *Id.*

c) Simple Judicial Determinations

A clear rule that precludes plaintiffs from filing claims once a finite period has elapsed provides courts with "structure and clarity."[214] When courts apply the discovery rule, they forfeit the luxury of such a lucid methodology, replacing a concrete determination of when infringement first occurred with an inherently ambiguous pronouncement on when a plaintiff first knew or should have known of an instance of infringement. In the example of the artist's infringement of DC Comics' Superman copyrights, how would a court determine when DC Comics first knew or should have known of the artist's infringement? One might conclude that even the most prudent plaintiff would not learn of the artist's infringement until the eBay auction. Many Internet sites, however, host web-columns chronicling insider information pertaining to comic books. One such web-column is "lying in the gutters."[215] If this web-column posted an article about the artist's five unique comic books shortly after the artist initially created these works, does the information in the column constitute sufficient notice to commence accrual of the statute of limitations under the discovery rule?[216] Should courts task plaintiffs with the responsibility of knowing about infringement of their copyrights even when the only news of such infringement comes from obscure or unreliable sources? Adoption of the discovery rule encourages excessive ambiguity in responding to these questions, eviscerates the prospect of simple judicial determinations, and fosters a lack of uniformity between similar cases. Alternatively, the injury rule furnishes a clear, unambiguous standard that fosters clarity, certainty, and consistency in judicial determinations.

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[214] *Id.* at 81.

[215] Rich Johnston, *Lying in the Gutters*, COMIC BOOK RESOURCES, http://www.comicbookresources.com/columns/index.cgi?column=litg (last visited Mar. 27, 2007).

[216] A judge may determine that the posting of this web-column is sufficient notice that a plaintiff could have known of the infringement, and, therefore, is barred under the discovery rule. Alternately, a judge could argue that one web-column, in such a vast forum like the Internet, is not enough notice to bar a claim.

3. Institutional Legitimacy

In order for the legal system to function properly, the public must believe that well-founded rules underlie the system and protect it from the specter of judicial whim.[217] Limitation of an individual judge's discretion promotes legitimacy throughout the judicial system. While the discovery rule curtails an individual judge's discretion to a certain extent, the unambiguous methodology of the injury rule is better suited to minimize the prospect of judicial prejudice. Equally important to the institutional legitimacy of the judicial system, however, is the system's ability to ensure that it does not exclude plaintiffs with valid claims from the legal process.[218] Plaintiffs with meritorious claims whom the system precludes from persisting with litigation will become disillusioned with the judicial system.[219] Adoption of the discovery rule precludes fewer claims than use of the injury rule. Consequently, the discovery rule may better serve this second aim of institutional legitimacy. Ultimately, the weighing of institutional legitimacy concerns requires careful balancing. If courts adopt the plaintiff-friendly discovery rule, they risk precariously exposing the rule of the legal system to judicial whim. If, however, they instead implement the injury rule more favorable to defendants, in so doing they could hamper the administration of truly equitable justice.

Perhaps acting in conformance with Congress' intent is the best means of furthering the legitimacy of the judicial system, for under this approach, the citizenry would likely attribute any perceived shortcomings of the legal system to the petulantly intractable will of Congress, rather than intransigent judges. Citizens upset about a given legal rule will address their displeasure to their elected officials rather than the judiciary, since if a legal rule emanates from Congress, Congress is responsible for the rule's existence. In applying such a rule, the judiciary could assert that it is merely

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[217] *See* Malveaux, *supra* note 185, at 81. If our judicial system is illegitimate then society would not follow the courts and could, in our democratic system, ask Congress and the Executive to limit judicial power. The Executive, in particular, can limit judicial power by refusing to enforce the Judiciary's decisions.

[218] *Id.*

[219] *Id.*

doing its job by following Congress's mandates. The burden to make changes to such a rule would fall squarely on Congress. This passing-the-buck approach to maintaining judicial legitimacy, like the *Auscape* court's analysis of legislative intent—with which it shares many similarities—would favor adoption of the injury rule for statute of limitations accrual calculations in the context of copyright infringement actions.

4. Policy Conclusion

On the whole, the injury rule is better-tailored to address the aforementioned policy concerns than the discovery rule. Adoption of the injury rule offers the prospect of clear, unambiguous, and uniform accrual calculations without impinging on considerations that originally led Congress to impose a statute of limitations on copyright infringement actions. Application of the discovery rule would only detract from such aspirations.

D. Are the Goals of Copyright Law Better Served by a Particular Rule?

Copyright law aims to "balance the interests of creators protecting their works and the constitutionally mandated public interest in the advancement of technology."[220] As copyright law has evolved, it has enabled rights holders to protect their copyrights with increasing ease.[221] Technological advancements, however, have fostered a commensurate increase in the degree of ease with which unlawful actors can infringe upon copyrighted works.[222]

1. The Injury Rule and the Goals of Copyright Law

It remains unclear whether imposition of the injury rule would further either of the goals of copyright law. Working under the shadow of the pro-defendant injury rule, creators might become less inclined to produce works, knowing that once they complete their works they will have to exhibit extreme vigilance if they wish

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[220] Payne, *supra* note 201, at 945–46.
[221] *Id.* at 946–47.
[222] *Id.* at 947.

to monitor and police effectively unlawful appropriation and infringement of the copyrights they hold in their works. Moreover, the injury may not even foster the goal of advancing the arts and sciences. This aim stems from the notion that those who seek to create new works may need to utilize older works in order to create something new.[223] Mandating that copyrights expire after a period of reasonable duration allows aspiring creators to either contract for the right to produce a work derived from or premised on an older work, or else wait until the older work enters the public domain before commencing work on their derivative creations.[224] Adoption of the injury rule appears at first glance to reward technologically advanced copyright infringers at the expense of promoting the *legal* advancement of technology, but perhaps copyright holders aware of the injury rule would be more likely to grant aspiring creators rights to produce works derived from or premised on their copyrighted works through contract in anticipation of the fact that if they failed to do so, these aspiring creators might well become actual infringers. Fears over the impossibility of effectively policing infringement on the part of copyright holders could thus engender a wider and more prevalent distribution of rights to copyrighted works, and in so doing lead to technological advancements. Furthermore, when copyright holders contract away some of the rights in their works to other parties, the various parties share the burden of protecting such works from infringement. Thus, on some level, the injury rule could further the advancement of technology.

2. The Discovery Rule and the Goals of Copyright Law

While adoption of the discovery rule may not foster technological advancement, it certainly would increase the quotient of statutory infringement protection copyright holders enjoy. Judicial implementation of the discovery rule would engender stringent protection of copyrighted works by allowing copyright

[223] Melanie Costantino, *Fairly Used: Why Google's Book Project Should Prevail under the Fair Use Defense*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235 (2006).

[224] *See* Ashok Chandra, *Crisis of Indefinite Consequence: How Derivative Works Exception and the Lanham Act Undercut the Remunerative Value of Termination of Transfers*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 241, 250 (2005).

owners to commence litigation once they learn of infringement, rather than at the time of infringement, or shortly thereafter. Would such increased protection tip the scales, disturbing the precarious balance between protecting individual rights and advancing technology that courts diligently attempt to maintain in the realm of copyright? Interestingly enough, the answer is no. Because of the sophistication of the actors in the copyright market, adoption of the discovery rule would not drastically change the timeframe within which plaintiffs are able to bring claims. If adoption of the discovery rule would expand the timeframe within which plaintiffs could file copyright infringement suits at all, it would do so only slightly, as courts would rule under almost all circumstances that sophisticated plaintiffs learned—or else reasonably should have learned—of any instances of substantial infringement well within the three-year time limit the Copyright Act's statute of limitations imposes.

V. CONCLUSION

This Note examined the costs and benefits of adopting either the discovery rule or the injury rule for statute of limitations accrual calculations in the context of copyright infringement actions. Courts following the precedent of the majority of circuit courts and the decisions of the Supreme Court narrowly would likely adopt the discovery rule.[225] Conversely, courts weighing only the effect of a particular accrual rule on statute of limitations policy concerns would likely embrace the injury rule, based upon the dual goals of copyright law: protection of individual creative rights and the advancement of the arts and sciences for the benefit of society.[226] While technological advances have made it easier for rights holders to police infringement of their copyrights, these very same advances have also made it much easier for infringers to access and appropriate copyrighted materials. Adopting the discovery rule redoubles only slightly the aspects of copyright protection that technological advancements have already whittled away.

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[225] *See supra* Part IV(A)(1) and accompanying notes.

[226] *See supra* Part IV(C)(4) and accompanying notes.

The most important goal of any statute of limitations, however, is repose. While adoption of the discovery rule renders repose slightly more difficult to attain, as technology continues to advance, plaintiffs will find themselves hard-pressed to present claims of infringement that occurred twenty years ago premised on assertions that they did not and should not have known of the alleged infringement earlier. The discovery rule's affect on repose is thus minimal, and the potential benefits derived from adoption of this rule outweigh any potentially adverse effects. Consequently, courts should adopt the discovery rule for statute of limitations accrual calculations in the context of copyright infringement claims in order to protect lawful copyright holders to the most thorough extent possible.

Our hearts may not go out to DC Comics and its inability to bring a claim against a single artist, especially since DC Comics is a subsidiary of Time Warner, a major corporation. But if the artist instead appropriated copyrights pertaining to the most popular character in a fledgling comic company's roster, both the infringement itself and its effect on comic book company's business would be far more significant. As this Note addressed previously, questions implicating statute of limitations accrual concerns do not arise often in the context of copyright infringement actions. In some cases this Note examined, the question of the applicable rule of accrual was inconsequential. In others, adoption of one accrual rule over another affected whether damages were awarded. The question of the applicable accrual rule proved dispositive in only a few cases, but these few cases do in fact matter. In order to grow and flourish, the aforementioned fledgling comic books company must be capable of stridently protecting its copyrights. Big corporations rarely suffer damage from anything but the most rampant, unrestrained infringement, particularly since they have the greatest amount of resources with which to police potential copyright violations. It is the cases involving the upstart creator, the fresh-faced musician, and the young computer programmer where the accrual issue is truly of great import. Copyright law strives to promote the arts and sciences while protecting intellectual property. The arts and sciences cannot advance if the law fails to safeguard the

intellectual property rights of the upstarts, dreamers, and entrepreneurs, those most in need of the law's protection.