No. 10-55853

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULA PETRELLA,
Plaintiff-Appellant,

v.

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

On Appeal from the United States District Court
for the Central District of California,
No. 2:09-cv-00072-GW-MAN

MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF REHEARING *EN BANC*

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MOTION

Pursuant to Federal Rules of Appellate Procedure 27 and 35(e), Plaintiff-Appellant Paula Petrella respectfully requests leave to file a reply to Defendants-Appellees' Response to her petition for rehearing *en banc*. Neither the Federal Rules of Appellate Procedure nor this Court's local rules address whether a party may submit a reply to a response to a petition for rehearing *en banc*. Still, the Federal Rules typically provide the party seeking relief an opportunity to reply to any opposition to the relief sought. *See, e.g.*, FED. R. APP. P. 28(c) ("The appellant may file a brief in reply to the appellee's brief."); *see also* FED. R. APP. P. 27(a)(4) ("Any reply to a response must be filed within 7 days after service of the response.").

More importantly, this Court has previously granted motions to file reply briefs in support of petitions for rehearing. *E.g.*, Order, *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc) (No. 07-15763), July 19, 2011, ECF No. 192; Order, *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc) (No. 09-56999), Dec. 9, 2010, ECF No. 35; *see also* CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE (THE RUTTER GROUP PRACTICE GUIDE) ch. 11-F, ¶ 1 (2012) ("[T]he petitioning party may file a motion to file a reply along with its proposed reply.").

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Here, Ms. Petrella seeks leave to file a reply to allow her to explain the importance of the circuit split, which the panel's decision further entrenched, and to rebut the new analogy to patent law that MGM raised in its Response.

First, MGM's Response, while denying an intra-circuit split, acknowledged the existence of an inter-circuit split. The panel's decision in this case established the Ninth Circuit as the only circuit that fully embraces the laches defense where the copyright statute of limitations operates. The panel's decision will encourage forum shopping—an issue MGM's Response ignores when it denies that this issue raises an "overriding need for national uniformity." 9TH CIR. R. 35-1.

Second, MGM's Response raises a new argument that was not addressed in its brief before the panel by drawing an inapt analogy between copyright and patent law. Ms. Petrella should be afforded an opportunity to rebut this argument.

Granting this motion should not prejudice appellants.

Wherefore, Plaintiff-Appellant respectfully requests leave to file the attached 13-page reply brief in support of her petition for rehearing *en banc*.

Respectfully submitted,

/s/

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APPELLANT'S REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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REPLY BRIEF

In their Response, appellees Metro-Goldwyn-Mayer, Inc., et al. ("MGM") deny the existence of an intra-circuit split and argue the merits of this case by analogy to patent law. But MGM admits that there is an inter-circuit split over this issue and quarrels only over its size. *See* Resp. to Pet. for Reh'g *En Banc* 5 ("Resp."). Under Federal Rule of Appellate Procedure 35(b)(1)(B), *en banc* review is warranted because this appeal "presents a question of exceptional importance . . . on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals." Contrary to MGM's assertion, *see* Resp. 5, the panel's opinion "substantially affects a rule of national application in which there is an overriding need for national uniformity," 9TH CIR. R. 35-1, because it encourages forum shopping. Of the over 9700 intellectual property suits and 395 intellectual property appeals nationwide the year before last, well over a quarter were initially filed in the district courts of the Ninth Circuit. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MAR. 31, 2011 tbls.B-7, C-3 (2011).[1] The panel's decision will likely impel plaintiffs to seek relief in circuits with rules more favorable to their claims.

[1] These tables are available at http://www.uscourts.gov/Statistics/Federal JudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx (last visited Sept. 28, 2012).

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The Ninth Circuit's uninhibited embrace of laches as a defense to copyright infringement actions is unique among the circuits. While this Court liberally allows the laches defense, and even presumes it in some cases, every other circuit that has ruled on this issue either bars a laches defense completely or limits it to narrowly defined circumstances.

On the merits, this Court's rule violates the principle of separation of powers, thereby earning the disdain of leading commentators. It also encourages forum shopping—the very concern that led Congress to enact a statute of limitations. Furthermore, MGM's analogy to patent law fails, because copyright and patent law are not interchangeable.

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ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH THOSE OF FIVE OTHER CIRCUITS THAT RESTRICT THE LACHES DEFENSE.

A. In Five Circuits, Laches Is Significantly Limited or Not Recognized at All as a Defense to Copyright Infringement.

1. MGM correctly acknowledges that the Fourth Circuit "refused to apply [laches] to truncate a statutorily-prescribed limitations period" for copyright infringement. Resp. 6. While MGM portrays the Fourth Circuit as "an outlier among the courts of appeal," *id.*, this Circuit is in fact the outlier. Of the six circuits that have decided this issue, all but this Circuit

either disallow laches entirely as a defense in copyright-infringement cases or disfavor and therefore significantly restrict it. This Circuit stands alone in liberally allowing a laches defense, and sometimes even presuming it, in copyright cases.

As the Fourth Circuit explained, "separation of powers principles dictate" that courts should not adopt equitable time limits to bar copyright infringement actions filed within the statute of limitations set by the legislature. *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001). The Sixth, Tenth, and Eleventh Circuits have cited the Fourth Circuit's separation-of-powers rationale approvingly in support of their reluctance to allow laches to bar copyright infringement claims. *Chirco v. Crosswinds Cmties., Inc.*, 474 F.3d 227, 231-32 (6th Cir. 2007); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 950-51 (10th Cir. 2002); *Peter Letterese & Assocs. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1320 (11th Cir. 2008).

2. In the Eleventh Circuit, "there is a strong presumption that a plaintiff's suit is timely if it is filed before the statute of limitations has run. Only in the most extraordinary circumstances will laches be recognized as a defense." *Peter Letterese & Assocs.*, 533 F.3d at 1320. Even where the circumstances meet that "extraordinary" threshold, laches does not bar

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prospective relief, *id.* at 1321, such as the injunctive relief sought by Ms. Petrella here. MGM does not attempt to distinguish the Eleventh Circuit's opinion, but instead implicitly concedes that the Eleventh Circuit has aligned itself with the Fourth in rejecting this Court's indulgent stance on laches.

3. MGM claims that the Sixth Circuit has "firmly rejected" the Fourth Circuit's rationale, Resp. 6, but overlooks the Sixth Circuit's high bar for laches, limiting it to cases involving the most extreme remedies where there is third-party reliance. In *Chirco*, the plaintiffs sought damages, an injunction, and the destruction of condominiums—many of which had already been built and sold to innocent third parties—that allegedly infringed upon their copyrights. 474 F.3d at 230. While the Sixth Circuit did not entirely abolish laches in copyright infringement cases, it recognized the Fourth Circuit's separation-of-powers concern and explained that laches should be reserved for "the most compelling of cases." *Id.* at 233. Thus, the Sixth Circuit "does not go so far" as the Ninth Circuit and will apply laches "'rarely' and only in 'unusual circumstances.'" *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 493 (6th Cir. 2007) (quoting *Chirco*, 474 F.3d at 233-34).

Chirco exemplifies how dissimilar a "compelling" case would be to this one. The Sixth Circuit declined to apply laches to the requested

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damages and injunctive relief, two remedies specifically enumerated in the Copyright Act. 17 U.S.C. §§ 502, 504. Resolution of a "debate [over] the wisdom of a three-year statute-of-limitations period [for these remedies] . . . is committed to the discretion of the legislature." *Chirco*, 474 F.3d at 235. Citing the unfair prejudice that would be suffered by the defendants who had constructed the condominiums and looking to the "109 individuals or families [who] actually occupied what they hoped to make their homes," the court applied laches only to prevent the destruction of the completed units. *Id.* at 235-36. Here, by contrast, Ms. Petrella seeks statutorily enumerated remedies that would not comparably harm third parties.

4. MGM also incorrectly minimizes the Tenth Circuit's conflict with this Court's approach. It contends that the Tenth Circuit "did not disagree with the Ninth Circuit's laches jurisprudence" because the Tenth Circuit cited *Jackson* and *Danjaq*. Resp. 8. While the Tenth Circuit did not explicitly disavow the Ninth Circuit's embrace of laches, it nonetheless expressly held that "[r]ather than deciding copyright cases on the issue of laches, courts should generally defer to the three-year statute of limitations." *Jacobsen*, 287 F.3d at 950. That presumption against laches is contrary to this Court's case law.

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5. While the Second Circuit has invoked laches to bar injunctive relief, it has explicitly refused to apply laches to damages remedies in infringement actions. *See New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 585 (2d Cir. 1989). That difference alone is enough to set it apart from the Ninth Circuit and would lead to a different result in this case, where Ms. Petrella seeks damages in addition to injunctive relief.

B. The Ninth Circuit Stands Alone in Freely Allowing, and in Some Cases Favoring, the Defense of Laches in Copyright Cases.

1. The Ninth Circuit is the only circuit that does not restrict the availability of laches as a defense to copyright infringement. As Judge Fletcher put it in his concurrence to the panel's decision, "[o]ur circuit is the most hostile to copyright owners of all the circuits." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, Nos. 10-55834 & 1055853, 2012 WL 3711706, at *10 (9th Cir. Aug. 29, 2012) (W. Fletcher, J., concurring). The Fourth Circuit has imposed an outright bar on the laches defense, *Lyons P'ship*, 243 F.3d at 798, and the Second, Sixth, and Eleventh Circuits limit the remedies to which laches can apply, *New Era*, 873 F.2d at 584-85; *Chirco*, 474 F.3d at 235; *Peter Letterese & Assocs.*, 533 F.3d at 1321. The Tenth Circuit "generally defer[s] to the three-year statute of limitations," *Jacobsen*, 287 F.3d at 950, while the Eleventh applies an across-the-board "strong

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presumption" against the defense, *Peter Letterese & Assocs.*, 533 F.3d at 1320.

2. In continuing-infringement cases, the Ninth Circuit has developed a "presumption" in favor of laches whenever any of the infringing conduct occurs outside of the three-year statute of limitations. *See Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006); *Petrella*, 2012 WL 3711706, at *3 (quoting *Miller*). This presumption originates in earlier Ninth Circuit cases concerning trademark infringement under the Lanham Act. *See Jarrow Formulas, Inc., v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002); *Miller*, 454 F.3d at 997. The panel's opinion carried this doctrine over into copyright cases as well, even though the Copyright Act (unlike the Lanham Act) expressly specifies a statute of limitations. *Compare Miller*, 454 F.3d at 997 n.11, *with* 17 U.S.C. § 507(b). This additional presumption, not found in any other circuit, makes it much harder—if not impossible—for a plaintiff to challenge successfully a continuing copyright infringement.

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II. A LACHES DEFENSE SHOULD NOT BE GENERALLY AVAILABLE, OVER AND ABOVE THE STATUTE OF LIMITATIONS, AS A DEFENSE TO COPYRIGHT INFRINGEMENT.

A. The Application of Laches Improperly Shortens the Statute of Limitations and Encourages Forum Shopping.

1. This Court's permissive allowance of the laches defense widens a circuit split that encourages forum shopping by copyright holders. Before 1957, federal copyright law had no statute of limitations. Courts thus applied varying state limitations periods, which "tend[ed] to encourage the practice of 'forum shopping.'" H.R. REP. NO. 85-150, at 1 (1957); *accord* S. REP. NO. 85-1014 at 2 (1957). Noting that "it is highly desirable to provide a uniform period throughout the United States," S. REP. NO. 85-1014 at 2, Congress enacted a three-year statute of limitations for civil actions. Act of Sept. 7, 1957, Pub. L. No. 85-313, § 1, 71 Stat. 633 (codified as amended at 17 U.S.C. § 507(b)). This Court's rule undermines that legislation. Had Ms. Petrella sued MGM in the Second or Eleventh Circuit, laches would likely not have barred her claim.[2] Future litigants will file accordingly.

2. MGM's analogy to patent law, *see* Resp. 14-15, is inapposite. Patent law and copyright law "are not identical twins." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 n.19 (1984). The Supreme

[2] MGM has a corporate office in New York and extensive activities in Florida.

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Court has therefore "exercise[d] . . . caution . . . in applying doctrine formulated in one area to the other," *id.*, and this Court should do the same. Moreover, forum shopping is impossible in patent infringement litigation because the Federal Circuit has exclusive appellate jurisdiction. 28 U.S.C. § 1295(a)(1).

B. Under Separation-of-Powers Principles, the Copyright Act's Statute of Limitations Precludes a Laches Defense.

1. Where the legislature provides a statute of limitations, it is not the judiciary's place to modify the rules of timeliness. The Supreme Court frowns on such judicial revision. "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *accord County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985) ("[A]pplication of the equitable defense of laches in an action at law would be novel indeed."); *United States v. Mack*, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law.").

The panel's decision ignores this fundamental rule and short-circuits Congress's statute of limitations. Laches applies when a suit is brought in "equity, in the absence of any statute of limitations." *Russell v. Todd*, 309 U.S. 280, 287 (1940). This Court's prior precedent conforms to this settled

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rule. *See Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 586 (9th Cir. 1993) ("[T]he doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern the action."). Neither this Court nor any other has offered a reason why the rule should be any different in the copyright context. *See also* 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 20:55 (2012) ("The availability of laches for conduct occurring within the limitations period is impermissible. . . . [L]aches should be limited to cases in which no statute of limitations applies.").

2. MGM's argument that there is or should be an extra requirement that plaintiffs "file[] infringement suits within the initial three-year statute of limitations after the claim first arose," Resp. 12-13, is incorrect. Most courts agree that so long as the "infringement occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.05[B][1][b] (2012); *see* 6 PATRY, *supra*, § 20:23. MGM's point is irrelevant: Ms. Petrella's suit is predicated on infringement occurring within, not before, the statute of limitations.

3. The panel erred in presuming laches in continuing-infringement cases. *Petrella*, 2012 WL 3711706, at *3. *Jarrow*'s presumption of laches

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was a "serious error[]" even in the trademark context, and it certainly should not have been extended further to "the very different field of copyright." 6 PATRY, *supra*, § 20.55. The Copyright Act, unlike the Lanham Act, has an express statute of limitations. *Compare* 17 U.S.C. § 507(b), *with Miller*, 454 F.3d at 997 n.11. As a leading expert explains, "[t]here is no role for laches in copyright cases." 6 PATRY, *supra*, § 20.55. The statute of limitations bars acts beyond the limitations period, but infringements that continue within the three-year period (such as those alleged by Ms. Petrella) remain actionable. *Id.*

C. Equitable Estoppel Is a More Appropriate, Narrowly Tailored Approach.

1. Even if the short three-year statute of limitations did not provide sufficient protection for defendants, equitable estoppel constitutes a more appropriate defense than laches. It requires the plaintiff to "intend that his conduct shall be acted on" by the defendant, who must "rely on" the plaintiff's "conduct to his injury." *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960). Estoppel better comports with separation-of-powers principles, since it does not rewrite a defense that Congress has already legislated. *Cf. Petrella*, 2012 WL 3711706, at *10-11 (W. Fletcher, J., concurring); 6 PATRY, *supra*, §§ 20:55, 20:57 (noting this Court's failure to distinguish between equitable laches and equitable

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estoppel). Contrary to MGM's assertion, *see* Resp. 12, equitable estoppel better avoids harming innocent owners who might be barred by an expansive laches defense. Only equitable estoppel both protects the defendant who relies on an intentionally deceptive plaintiff and also requires proof that the plaintiff acted in bad faith before barring recovery.

2. Any issues relating to evidentiary prejudice, *see* Resp. 10-11, should be addressed on remand under the correct legal standard. Equitable estoppel would prompt the parties to engage the issues and the facts differently on remand.

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CONCLUSION

Wherefore, this Court should grant plaintiff-appellant's petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-1, the body of this brief is proportionally spaced, has a 14-point font size and Times New Roman typeface in the text, does not exceed 15 pages in length, and contains 2,503 words according to Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, I caused a copy of the foregoing MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF REHEARING *EN BANC* to be filed through the Court's electronic filing system, which serves counsel for other parties who are registered participants as identified on the Notice of Electronic Filing (NEF) and below. Any counsel for other parties who are not registered participants are being served by first class mail on the date of the electronic filing.

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