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Why Petrella v. MGM Guarantees Patentees Six Years of Prefiling Damages

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I. Introduction

This Comment examines and analyzes the impact of *Petrella v. Metro-Goldwyn-Mayer, Inc.*[1] on the equitable defense of laches in patent law. The issue before the Supreme Court in *Petrella* was "whether the equitable defense of laches (unreasonable, prejudicial delay in commencing suit) may bar relief on a copyright infringement claim brought within § 507(b)'s three-year limitation period."[2] Justice Ginsburg, writing for the 6-3 majority, held that a defendant cannot invoke the equitable defense of laches to preclude adjudication of a claim for copyright infringement brought within the three-year window prescribed by Congress.[3] The Court reasoned that "[t]o the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period . . . courts are not at liberty to jettison Congress' judgment on the timeliness of suit."[4] Laches is not properly applied when a statute has a statute of limitations because laches is a "gap-filling, not legislation-overriding" defense.[5] Although *Petrella* only addressed the impact of a statute of limitations on laches in copyright law and explicitly stated that it was not addressing the Patent Act[6], the decision casts doubt on the viability of laches in patent law.[7]

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[1] Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014).
[2] *Id.* at 1967.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1974.
[6] *Id.* at n.15.
[7] Todd Vare, *"Raging Bull" Copyright Opinion May Impact Patent Cases*, LAW 360 (May 27, 2014 12:30PM), http://www.law360.com/articles/541533/raging-bull-copyright-opinion-may-impact-patent-cases ("Given the similarity of [section 286 of the Patent Act and section 507(b) of the Copyright Act], the Supreme Court's opinion in *Petrella* may call into question the applicability of laches to patent infringement claims."); Bill Donahue, *"Raging Bull" Will Be A Fight In The Patent Ring*, LAW 360 (May 29, 2014, 1:00 PM), http://www.law360.com/articles/542427/raging-bull-will-be-a-fight-in-the-patent-ring (noting that the *Petrella* opinion "took a fairly settled situation in patent law and, at the very least, opened it up for debate").

The leading case on the equitable defense of laches in patent law is *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*[8] In *Aukerman*, the plaintiff-appellant, Aukerman, argued that "where an express statute of limitations applies against a claim, laches cannot apply *within* the limitations period."[9] The 9-1 en banc opinion, written by Chief Judge Nies, rejected the plaintiff-appellant's argument.[10] In so rejecting, the court noted that "section 286 [of the Patent Act] is not a statute of limitations in the sense of barring a suit for infringement."[11] Rather, the effect of § 286 is to "limit recovery to damages for infringing acts committed within 6 years of the date of the filing of the infringement action," a process that is done "arbitrarily" and in the absence of any other "impediment to recovery or maintenance of the suit such as application of the doctrine of laches."[12] The Federal Circuit also rejected the plaintiff-appellant's second argument that it was improper to bar recovery for damages flowing from a continuing tort, such as patent infringement.[13] The court concluded that laches does not have to be established for each infringing act because "continuous tortious acts may be deemed to constitute a unitary claim."[14] Importantly, the court based its decision on the apparent conflict with Supreme Court precedent in which laches had been applied against continuing torts.[15] Part II of this Comment will summarize the equitable defense of laches in patent law and will further analyze the *Aukerman* decision.[16]

The remainder of the Comment will focus on the impact of the *Petrella* decision. Part III will develop the facts of *Petrella* and explain how the combination of a federally prescribed statute

[8] A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992) (en banc).
[9] *Id.* at 1030 (emphasis in original).
[10] *Id.* ("We are unpersuaded that section 286 [of the Patent Act] should be interpreted to preclude the defense of laches and provide, in effect, a guarantee of six years damages regardless of equitable considerations arising from delay in assertion of one's rights.").
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1031.
[14] *Id.*
[15] *Id.*
[16] *See infra* Part II.

of limitations and the separate-accrual rule in copyright law has effectively erased the equitable defense of laches from the copyright lexicon.[17] Part IV will discuss *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*,[18] the Federal Circuit's first opinion subsequent to *Petrella* involving the application of the equitable defense of laches in patent law.[19] Part V will argue that the Federal Circuit in *SCA Hygiene* incorrectly interpreted *Petrella* and will explain why the *Petrella* opinion will inevitably impact patent law.[20] Part V will also argue that § 286 of the Patent Act, although not a claim-barring statute of limitations, is still a timeframe prescribed by Congress that will be impacted by the *Petrella*.[21] Lastly, Part V argues that *Petrella* guarantees patentees six years of prefiling damages because patent infringement is a continuing tort that, similar to copyright infringement, applies the separate-accrual rule.[22] Part VI will conclude this Comment by arguing that *SCA Hygiene* should be taken up by the en banc Federal Circuit or, alternatively, the Supreme Court should grant certiorari in order to reject the continuing viability of the equitable defense of laches in patent law for barring damages incurred within six years of filing suit.[23]

II. The Equitable Defense Of Laches In Patent Law

This part of the Comment will provide a general overview of the equitable defense of laches in patent law. Part A will summarize how a defendant may utilize laches as a defense to a claim

[17] *See infra* Part III.
[18] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, No. 2013-1564, 2014 US App. LEXIS 17830 (Fed. Cir. Sep. 17, 2014).
[19] *See infra* Part IV
[20] *See infra* Part V.
[21] *See infra* Part V.
[22] *See infra* Part V.
[23] *See infra* Part VI.

for patent infringement. Part B will analyze *Aukerman*, the leading case on the application of laches in patent law. Part C will summarize the precedential effect of *Aukerman*.

A. Overview Of The Equitable Defense Of Laches

Section 282 of the Patent Act is the statutory basis for the equitable defense of laches.[24] Although the text does not explicitly provide for the defense of laches,[25] the application of laches to a claim of patent infringement "was well established at the time of recodification of the patent laws in 1952."[26] The commentary of one of the drafters of the Patent Act of 1952 confirms Congress' intention to retain the defense of laches.[27] The first paragraph of § 282 of the Patent Act "include[s] 'equitable defenses such as laches, estoppel and unclean hands.'"[28]

Laches was initially a defense to a patent-infringement action brought in equity.[29] As previously stated, laches extended into suits at law and was a well-established defense to a claim of patent infringement when the patent laws were recodified in 1952.[30] In the legal context, laches is defined as "the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar."[31] Since laches was, and remains to be, equitable in nature, its

[24] The Patent Act, 35 U.S.C. § 282 (2012); A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1028 (Fed. Cir. 1992) (en banc). ("Laches is cognizable under 35 U.S.C. § 282 (1988) as an equitable defense to a claim for patent infringement.").
[25] The relevant statutory language of § 282 cited by *Aukerman* reads: "The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: (1) Noninfringement, absence of liability for infringement, or unenforceability." *Aukerman*, 960 F.2d at 1029 (quoting 35 U.S.C. § 282).
[26] *Id.*
[27] *Id.* (citing P.J. Federico, *Commentary on the New Patent Law*, 35 U.S.C.A. 1, 55 (West 1954)).
[28] *Id.* (quoting J.P. Stevens & Co. v. Lex Tex Ltd. Inc., 747 F.2d 1553, 1561 (Fed Cir. 1984)).
[29] *Id.* at 1028.
[30] *Id.* at 1029.
[31] *Id.* at 1028–29.

determination is "committed to the sound discretion of the trial judge and the trial judge's discretion is reviewed by [the Federal Circuit] under the abuse of discretion standard."[32]

In order to establish the equitable defense of laches, the defendant must establish two elements: (1) the patentee's delay in bringing the patent-infringement action was "unreasonable and inexcusable;" and (2) the defendant "suffered material prejudice attributable to the delay."[33] A district court should consider these two elements and "all of the evidence and other circumstances to determine whether equity should intercede to bar pre-filing damages."[34] Thus, if the defendant successfully establishes these two elements, "the patentee's claim for damages prior to suit may be barred."[35]

There is no specific duration of time that a court may determine is per se unreasonable when attempting to determine the first element to establish laches.[36] However, if a patentee delays bringing suit "more than six years after the date the patentee knew or should have known of the alleged infringer's activity," a presumption of laches arises.[37] If there is a presumption of laches, it shifts the burden of production[38] to the plaintiff, but it does not shift the burden of persuasion.[39] A patentee's delay in bringing suit is measured from "the time the plaintiff knew or reasonably should have known of the defendant's alleged infringing activities to the date of the suit."[40] Thus, the first element only looks at the actions of the plaintiff.

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[32] *Id.* at 1028.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1032 ("The length of time which may be deemed unreasonable has no fixed boundaries but rather depends on the circumstances.").
[37] *Id.* at 1028.
[38] The burden of production is defined as "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." BLACK'S LAW DICTIONARY (9th ed. 2009).
[39] *Aukerman*, 960 F.2d at 1028. The burden of persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." BLACK'S LAW DICTIONARY (9th ed. 2009).
[40] *Aukerman*, 960 F.2d at 1032.

There are two types of material prejudice that may be used to satisfy the second element of the laches defense, economic prejudice and evidentiary prejudice.[41] The first type, evidentiary prejudice, may arise because a defendant may not be able to present a full and fair defense on the merits due to lack of available evidence.[42] Examples of evidentiary prejudice are "the loss of records, the death of a witness, or the unreliability of memories of long past events."[43] Evidentiary prejudice undermines the ability of the court to fairly assess the facts of the case.[44] The second type of material prejudice is economic prejudice.[45] Economic prejudice considers the "*change* in the economic position of the alleged infringer during the period of delay."[46] Examples of economic prejudice may include situations where "a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by an earlier suit."[47] Either type of prejudice may be sufficient to establish the second element of the laches defense.[48]

Despite the lack of explicit statutory guidance, the Federal Circuit has concluded that it had "no difficulty in reading section 286 harmoniously with the recognition under section 282 of the laches defense."[49] The following subpart will analyze the facts and holding of the en banc *Aukerman* opinion, which has served as the basis for the application of laches in patent law since it was decided in 1992.

B. Analysis of *Aukerman*.

[41] *Id.* at 1033.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* (emphasis in original)
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1030.

Plaintiff-appellant Aukerman initiated a patent-infringement suit against the defendant, Chaides, for the alleged infringement of U.S. Patent Nos. 3,793,133 and 4,014,633.[50] The patents-in-suit related to "a method and device for forming concrete highway barriers capable of separating highway surfaces of different elevations."[51] In 1977, Aukerman entered into a license agreement with Gomaco Corp., which made Gomaco a licensee of Aukerman's patents and required Gomaco to notify Aukerman of companies who purchased Gomaco's product.[52] Chaides subsequently purchased Gomaco's product, and Gomaco informed Aukerman of Chaides' purchase.[53]

Upon receiving the notification of Chaides' purchase, Aukerman's counsel advised Chaides, by a letter dated February 13, 1979, that Chaides' use of Gomaco's product "raised 'a question of infringement with respect to one or more of [Aukerman's patents-in-suit]' and offered Chaides a license."[54] Correspondence between Aukerman and Chaides continued for two months and concluded with Chaides stating Aukerman should sue them "for $200-$300 a year."[55] Although the opinion does not make it clear, this $200-$300 figure was likely based on Chaides' estimation of the damages based on the size of Chaides' business. After Chaides' letter, "[t]here was no further correspondence or contact between the parties for more than eight years."[56]

In 1987, Aukerman became aware that Chaides had become a "substantial competitor" utilizing the patents-in-suit.[57] This prompted Aukerman's counsel to send another letter to Chaides on October 22, 1987, which threatened litigation.[58] Both parties remained silent until August 2,

[50] *Id.* at 1026.
[51] *Id.* (emphasis deleted).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 1026–27.
[56] *Id.* at 1027.
[57] *Id.*
[58] *Id.*

1988 when Aukerman's counsel again wrote Chaides and explained more fully Aukerman's proposed licensing offer.[59] Chaides did not respond to the August 2, 1988 letter.[60] Aukerman then filed the present action with the district court on October 26, 1988.[61]

The United States District Court for the Northern District of California granted summary judgment to the defendant Chaides, holding that "the doctrine of laches and estoppel barred Aukerman's claims for relief."[62] The court ruled determined that Aukerman's delay of more than six years "shifted the burden to Aukerman to prove that its delay was reasonable and was not prejudicial to Chaides."[63] The court rejected Aukerman's arguments that the delay was reasonable because Aukerman was involved in other litigation and Chaides' infringement was de minimis.[64]

On appeal, the panel decision of the Federal Circuit vacated and remanded the case back to the district court because, in its view, which the en banc decision subsequently rendered erroneous,[65] the district court "erred in placing the burden on Aukerman to rebut the presumption [of laches] rather than on Chaides to prove its equitable defenses."[66] The panel's decision was vacated and withdrawn when the Federal Circuit granted a rehearing en banc.[67]

The Federal Circuit reheard the case en banc "to reconsider the principles of laches and equitable estoppel in a patent infringement suit."[68] The plaintiff-appellant Aukerman made two arguments at the Federal Circuit, each of which will be addressed in turn below.

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1027.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1028.
[66] A.C. Aukerman Co. v. R.L. Chaides Co., No. 90-1137, 1991 U.S. App. LEXIS, at *27 (Fed. Cir. Apr. 25, 1991).
[67] A.C. Aukerman Co. v. R.L. Chaides Co., 1991 U.S. App. LEXIS 11706 (Fed. Cir May 22, 1991) (en banc).
[68] *Aukerman*, 960 F.2d at 1026.

1.Aukerman's First Argument: The Recognition Of Laches Conflicts With § 286 Of The Patent Act.

First, Aukerman argued that "the defense of laches is inapplicable, as a matter of law, against a claim for damages in patent infringement suits."[69] Aukerman reasoned that the "recognition of laches as a defense conflicts with 35 U.S.C. § 286" because § 286 "is comparable to a statute of limitations which effectively preempts the laches defense."[70] Section 286 provides, in relevant part: "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action."[71] Importantly, the language of the statute has not changed since the Federal Circuit decided *Aukerman.*[72] According to Aukerman's argument, if § 286 were interpreted to be a statute of limitations, laches could not be applied.[73]

The Federal Circuit not only rejected Aukerman's argument that § 286 was the type of statute of limitations would make laches inapplicable, but it also rejected Aukerman's position that laches cannot operate within a window created by a statute of limitations.[74] First, as a threshold matter, the court found that even if § 286 were an express statute of limitations, "laches is routinely applied within the prescribed statute of limitations period for bringing the claim."[75] However, the court found that § 286 was "not a statute of limitations in the sense of barring a suit for infringement."[76] Rather, "the effect of section 286 is to limit recovery to damages for infringing

[69] *Id.* at 1029.
[70] *Id.*
[71] 35 U.S.C. § 286 (2012).
[72] *See Aukerman*, 960 F.2d at 1029 (quoting 35 U.S.C. § 286 (1988)).
[73] *Id.*
[74] *Id.* at 1030.
[75] *Id.* (listing examples where laches has been to claims brought within the prescribed statute of limitations period).
[76] *Id.* (citing Standard Oil Co. v. Nippon Shokubai Kagaku Kogyo Co., 754 F.2d 345, 347–48 (Fed. Cir. 1985)).

acts committed within six years of the date of the filing of the infringement action."[77] The Federal Circuit explained that § 286 functions by counting backwards six years from the date of the complaint to limit pre-filing damages, a process that is done "arbitrarily."[78] The recovery within this six years "assumes . . . no other impediment to recovery or maintenance of the suit such as application of the doctrine of laches."[79] Accordingly, the Federal Circuit was "unpersuaded that section 286 should be interpreted to preclude the defense of laches and provide, in effect, a guarantee of six years damages regardless of equitable considerations arising from delay in assertion of one's rights."[80]

The Federal Circuit relied primarily on circuit precedent, the language of the statute, and legislative history when it determined that § 286 was not a true statute of limitations. First, the court relied on the fact that the patent statute from 1870-1874 "contained an actual statute of limitations, which required 'all actions for the infringement of patents shall be brought during the term for which letters patent shall be granted or extended, or within six years after the expiration thereof.'" [81] Although not explicitly stated by the court, it is reasonable to infer that since a true claim-barring statute is no longer present, Congress did not consider § 286 to be a statute of limitations because it knew how to write a claim-barring statute but elected not to do so when enacting § 286. Second, the court stated that "[w]ithout exception, all circuits recognized laches as a defense to a charge of patent infringement despite the reenactment of the damages limitation [§ 286] in the 1952 statute."[82] Thus, according to the Federal Circuit, precedent and legislative history mandated the finding that laches can apply to § 286 of the Patent Act.

[77] *Id.*
[78] *Id.*
[79] *Id.* (citation omitted) (internal quotation marks omitted).
[80] *Id.*
[81] *Id.* at n.8 (quoting 16 Stat. 206, § 55 (July 8, 1870)).
[82] *Id.*

Although the Federal Circuit grounded its decision in legislative history and circuit precedent, the court concluded that it had "no difficulty in reading section 286 harmoniously with the recognition under section 282 of the laches defense" even when "looked at afresh."[83] The court reasoned that through § 286, "Congress imposed an *arbitrary* limitation on the period for which damages may be awarded on any claim for patent infringement."[84] The court further reasoned that since laches "invokes the *discretionary* power of the district court to limit the defendant's liability for infringement by reason of the equities between the parties," recognition of the defense would not "affect the general enforceability of the patent against others or the presumption of its validity under section 282."[85] Lastly, the court summarized that "[n]othing in section 286 suggests that Congress intended by reenactment of this damage limitation to eliminate the long recognized defense of laches or to take away a district court's equitable powers in connection with patent cases."[86] The Federal Circuit concluded, contrary to Aukerman's position, that a court's discretionary powers under § 282 and the arbitrary limitation in § 286 do not conflict with one another.[87]

2. Aukerman's Second Argument: Laches Is An Improper Defense To Completely Bar Recovery Of Prefiling Damages From A Continuing Tort, Such As Patent Infringement

[83] *Id.*
[84] *Id.* (emphasis in original).
[85] *Id.* (emphasis in original).
[86] *Id.*
[87] *Id.* at 1030–31.

Aukerman's second argument stated that "it is improper to utilize laches as a defense to completely bar recovery of prefiling damages flowing from a continuing tort, such as patent infringement."[88] The basis for Aukerman's argument is that since each act of patent infringement is deemed a separate claim, the laches defense must be established separately for each and every act of infringement.[89] The Federal Circuit disagreed, however, and noted that "Aukerman's theory conflicts with the precedent of the Supreme Court in which laches has been applied against continuing torts."[90]

In rejecting Aukerman's argument, the court reasoned that laches is "a single defense to a continuing tort up to the time of the suit, not a series of individual defenses which must be proved as to each act of infringement, at least with respect to infringing acts of the same nature."[91] With respect to laches, "continuing tortious acts may be deemed to constitute a unitary claim."[92] The Federal Circuit subsequently reaffirmed its ruling in *Leinoff v. Louis Milona & Sons*, 726 F.2d 734 (Fed Cir. 1984) and held that "laches is available as a defense to a suit for patent infringement."[93] As a result, the court rejected Aukerman's second argument and concluded that laches could bar his claim.[94]

C. Effect Of *Aukerman*

[88] *Id.* at 1031.
[89] *Id.*
[90] *Id.* (citing Supreme Court cases involving patent infringement and trademark infringement).
[91] *Id.*
[92] *Id.* Patent infringement is a continuing tort because each act of infringement is a separate claim. *Id.* See Part III.B. *infra* for a further discussion of continuing torts.
[93] *Id.* at 1032.
[94] *Id.*

Aukerman has been the leading case on the application of laches in patent law for over twenty-two years; however, as the next part of this Comment will explain, the Supreme Court's decision in *Petrella* casts doubt on the long-term viability of *Aukerman*. The petitioner in *Petrella* made essentially the same arguments made by Aukerman, and fortunately for Petrella, the Supreme Court found in her favor. While there are some differences between patent law and copyright law,[95] Part V of this Comment will explain that these differences are not so substantial that *Petrella* will not impact patent law. Despite the differences between patent law and copyright law, the broad language of the Court in *Petrella* will inevitably impact patent law and the precedential value of *Aukerman*.

III. The Impact Of *Petrella* On Copyright Law

This part will go through the facts and holding of *Petrella* and will subsequently explain the impact of the opinion on the defense of laches in copyright law. The facts of the case are relevant to give context to the Court's analysis. Similarly, it is important to understand the Court's reasoning in order to appreciate why *Petrella* will extend into patent law. Part A will summarize the relevant facts of *Petrella*. Part B will analyze the Court's reasoning in *Petrella*.

A. Facts Of *Petrella*

[95] Dennis Crouch, *Federal Circuit Defies Supreme Court in Laches Holding*, PATENTLY-O (Sept. 21, 2014), http://patentlyo.com/patent/2014/09/federal-supreme-holding.html (noting that the copyright statute of limitations is more direct and the three-year limitation is a much lower percentage of the overall copyright term).

The copyrighted work at issue was a screenplay based on the life of former boxing champion Jake LaMotta.[96] The screenplay, which was registered in 1963, is one of three copyrighted works that was made by LaMotta and his longtime friend Frank Petrella.[97] In 1976, the duo assigned their rights in the three works, including the renewal rights, to a company that was later acquired by MGM.[98] In 1980, MGM released the infringing work, a motion picture entitled *Raging Bull*.[99] Frank Petrella subsequently died in 1981, ten years before the initial copyright expired.[100] Under 17 U.S.C. § 304(a)(1)(C)(ii)-(iv), Paula Petrella inherited the renewal rights.[101] And under the Supreme Court's holding in *Stewart v. Abend*, 495 U.S. 207 (1990), MGM may only continue to use the copyrighted work if Paula Petrella transferred the renewal rights to them.[102] She did not transfer the renewal rights, but MGM continued "to market the film, and has converted it into formats unimagined in 1980, including DVD and Blu-ray."[103]

In 1991, Paula Petrella timely renewed the copyright, but she did not contact MGM until 1998.[104] Petrella's attorney and MGM disputed the validity of the copyright-infringement claims for the next two years.[105] Petrella did not file suit until nine years later.[106]

On January 6, 2009, the petitioner, Paula Petrella, filed a copyright-infringement action in the United States District Court for the Central District of California.[107] Petrella sought monetary

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[96] Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1970 (2014).
[97] *Id.* The copyrights in the other two works were not timely renewed, so they are not at issue in this case. *Id.* at 1971.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1968.
[102] *Id.* ("[I]f an author who has assigned her rights away dies before the renewal period, then the assignee may continue to use the original work to produce a derivative work only if the author's successor transfers the renewal rights to the assignee.") (internal quotation marks omitted).
[103] *Id.* at 1971.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

and injunctive relief from MGM for its alleged violation of her copyright.[108] Petrella only sought relief for "acts of infringement occurring on or after January 6, 2006," which is exactly three years prior to the date she filed suit.[109] MGM moved for summary judgment on several grounds, including the equitable defense of laches.[110]

The district court granted MGM's motion, reasoning that MGM was prejudiced by Petrella's delay in bringing suit.[111] The United States Court of Appeals for the Ninth Circuit affirmed the laches-based dismissal.[112] The Supreme Court subsequently granted certiorari to "resolve a conflict among the Circuits on the application of the equitable defense of laches to copyright infringement claims brought within the three-year look-back period prescribed by Congress."[113]

B. Analysis Of *Petrella*

The Supreme Court reversed the holding of the Ninth Circuit because the Ninth Circuit failed "to recognize that the copyright statute of limitations, § 507(b), itself takes account of delay."[114] The Court noted that the statute of limitations in combination with the separate-accrual rule attending § 507(b) allows the copyright owner to recover damages within the three-year look-back period prescribed in § 507(b).[115] Accordingly, the Court held that laches "cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window" prescribed

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1971–72.
[112] *Id.* at 1972.
[113] *Id.* (noting the circuit split).
[114] *Id.* at 1973.
[115] *Id.*

by Congress.[116] The Court reasoned that "courts are not at liberty to jettison Congress' judgment on the timeliness of suit" when a copyright owner "seeks relief solely for conduct occurring within the limitations period."[117]

The Copyright Act did not include a statute of limitations for civil suits until 1957.[118] Prior to 1957, courts used analogous state statutes of limitations for determining the timeliness of suit.[119] Those courts also occasionally invoked laches to abridge the state-law prescription.[120] According to the Court, this is permissible because those courts were "merely filling a legislative hole."[121] In 1957, however, Congress "addressed the matter and filled the hole" by enacting § 507(b) of the Copyright Act, which reads: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."[122] Subsequent to the enactment of a statute of limitations, laches could no longer be properly applied.

A copyright infringement claim "ordinarily accrues when a plaintiff has a complete and present cause of action."[123] According to the Court, "[i]t is widely recognized that the separate-accrual rule attends the copyright statute of limitations."[124] This means that the statute of limitations runs separately from each act of infringement.[125] Thus, "each time an infringing work is reproduced or distributed, the infringer commits a new wrong."[126] Accordingly, under § 507(b),

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[116] *Id.* at 1967.
[117] *Id.*
[118] *Id.* at 1968.
[119] *Id.*
[120] *Id.*
[121] *Id.* (quoting Teamsters & Employers Welfare Trust of Ill. V. Gorman Bros. Ready Mix, 283 F.3d 877, 881 (2d Cir. 2002)) (internal quotation marks omitted).
[122] *Id.* at 1968–69 (quoting 17 U.S.C. § 507(b) (2012)).
[123] *Id.* at 1969 (citation omitted) (internal quotation marks omitted).
[124] *Id.* (citations omitted).
[125] *Id.*
[126] *Id.*

each infringing act is actionable for up to three years because the statute provides recovery for claims "commenced within three years after the claim accrued."[127]

Laches may only be applied in "extraordinary circumstances."[128] The *Petrella* Court noted two cases in which there might be "extraordinary circumstances" that would warrant the invocation of laches: (1) *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227 (6th Cir. 2007); and (2) *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989).[129] In *Chirco*, the Sixth Circuit held that the requested relief would be inequitable for two separate reasons.[130] First, the plaintiffs knew of the defendant's plan to create an allegedly infringing work and failed to take readily available measures to stop them.[131] Second, the plaintiff's requested relief "would work an *unjust* hardship upon the defendants and innocent third parties."[132] While these two examples of extraordinary circumstances are by no means exhaustive, the statute of limitations "leaves little place for a doctrine that would further limit the timeliness of a copyright owner's suit."[133]

In the absence of extraordinary circumstances, *Petrella* instructs that laches should not be applied to a claim for copyright infringement brought within the three-year window prescribed by Congress.[134] Laches is a "gap-filling, not legislation-overriding defense."[135] If courts were able to individually determine the timeliness of suit, it would "tug against the uniformity Congress

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[127] The Copyright Act, 17 U.S.C. § 507(b) (2012).
[128] *Petrella*, 134 S. Ct at 1977.
[129] *Id.* at 1978. In *Chirco*, the defendants used the plaintiffs' copyrighted architectural design. *Id.* The plaintiffs, long aware of defendants' plans to build a housing project using their copyrighted design, took no steps to halt the project until more than 168 units were built, 109 of which were occupied. *Id.* Thus, granting the plaintiffs' motion would work an unjust hardship on the defendants and innocent third parties. *Id.* In *New Era*, the plaintiff waited over two years to assert his rights. *Id.* The plaintiff waited until the infringing book was printed, packed, and shipped. *Id.* Granting plaintiff's motion would have resulted in total destruction of the work. *Id.*
[130] *Id.* (citing *Chirco*, 474 F.3d at 236).
[131] *Id.* (citing *Chirco*, 474 F.3d at 236).
[132] *Id.* (citing *Chirco*, 474 F.3d at 236) (emphasis in original).
[133] *Id.* at 1977 (citation omitted) (internal quotation marks omitted).
[134] *Id.*
[135] *Id.* at 1974.

sought to achieve when it enacted § 507(b)."[136] Subsequent to *Petrella*, the equitable defense of laches applies only to "claims of an equitable cast for which the Legislature has provided to fixed time limitation."[137]

IV. Current Status Of Laches In Patent Law Subsequent To *Petrella*: *SCA Hygiene* v. *First Quality*.

On September 17, 2014, Circuit Judge Hughes, writing for a unanimous panel also including Circuit Judges Reyna and Wallach, concluded that *Petrella* did not compel a finding that *Aukerman* was no longer good law and that laches was still applicable to the Patent Act.[138] This decision represents the Federal Circuit's first opportunity to address *Petrella*, but the panel failed to deviate from Federal Circuit precedent. The court noted that footnote 15 of the *Petrella* decision, which stated that the Supreme Court "had not had occasion to review the Federal Circuit's position [in *Aukerman*]," [139] left the en banc *Aukerman* decision intact.[140] The Federal Circuit thus concluded that it was bound by *Aukerman* until the issue was decided by the Supreme Court or the Federal Circuit en banc.[141]

As will be explained in Part V *infra*, the Federal Circuit failed to understand the clear import of the *Petrella* decision.[142] Part V will explain why the *SCA Hygiene* decision erred in its

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[136] *Id.* at 1975.
[137] *Id.* at 1973.
[138] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, No. 2013-1564, 2014 US App. LEXIS 17830, at *9–10 (Fed. Cir. Sep. 17, 2014).
[139] *Petrella*, 134 S. Ct. at 1974 n.15.
[140] *SCA Hygiene*, 2014 U.S. App. LEXIS 17830 at *9–10. ("Because *Aukerman* may only be overruled by the Supreme Court or an en banc panel of this court, *Aukerman* remains controlling precedent.").
[141] *Id.* at *10.
[142] *See* Dennis Crouch, *Federal Circuit Defies Supreme Court in Laches Holding*, PATENTLY-O (Sept. 21, 2014), http://patentlyo.com/patent/2014/09/federal-supreme-holding.html (suggesting that the Federal Circuit's reticence is due to the relatively new judges on the panel).

analysis of the *Petrella* opinion, which contains broad language that will impact patent law. The Federal Circuit should have taken the opportunity to correct the injustice to patentees that *Aukerman* has caused for the past twenty-two years.

V. Reasons Why *Petrella* Will Impact Patent Law

This part will argue that the Federal Circuit in *SCA Hygiene* incorrectly interpreted *Petrella* and will explain why the *Petrella* opinion will impact patent law. Although, as the Federal Circuit in *SCA Hygiene* correctly points out, the majority opinion in *Petrella* explicitly stated that it "had not had occasion to review the Federal Circuit's position [in *Aukerman*],"[143] the breadth of the language in *Petrella* is too expansive for laches to survive in patent law. The paragraphs below further explain why the broad language in *Petrella* will allow patentees to recover six years of prefiling damages because laches cannot apply to bar the legal relief explicitly prescribed by Congress in § 286. Part A will explain why § 286 is also a statute of limitations that will be impacted by *Petrella*. Part B will discuss the separate-accrual rule attendant in both patent and copyright infringement. Part C will show why public policy supports allowing patentees to recover six years of prefiling damages, regardless of the laches defense.

A. Section 286 Of The Patent Act Is A Statute Of Limitations That Will Be Impacted By *Petrella*

[143] *Petrella*, 134 S. Ct. at 1974 n.15.

The Federal Circuit's reasoning in *Aukerman* is directly contradicted by the broad language in *Petrella*. The plaintiff-appellant in *Aukerman* made essentially the same argument that carried the day in *Petrella*.[144] The Federal Circuit rejected Aukerman's argument that laches could not be applied in the presence of a statute of limitations for two reasons.[145] First, the Federal Circuit stated that "laches is routinely applied within the prescribed statute of limitations period for bringing the claim."[146] This is directly contradictory to the Supreme Court's acknowledgement that it was not aware of any case in which it "approved the application of laches to bar a claim for damages brought within the time allowed by a federal statute of limitations."[147] The Federal Circuit's second, alternative reasoning was its attempt to distinguish § 286 by stating that "section 286 is not a statute of limitations in the sense of barring a suit for infringement."[148] Despite the Federal Circuit's characterization of § 286 as "arbitrary,"[149] the six-year period is still a limitation on damages. In § 286, Congress explicitly stated that "no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action."[150] The *Petrella* Court also rejected this type of reasoning when it noted that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[151] Central to the Supreme Court's holding was the "ongoing separation of legal and equitable remedies."[152] Since § 286 of the Patent Act is a statute of limitations, as will be

[144] *Compare* A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1029 (Fed. Cir. 1992) (en banc) ("Aukerman first argues that recognition of laches as a defense conflicts with 35 U.S.C. § 286 (1988)" because "this provision is comparable to a statute of limitations which effectively preempts the laches defense.") *with Petrella*, 134 S. Ct at 1971 (explaining that Ms. Petrella only sought damages within the three-year window created by the statute of limitations).
[145] *Aukerman*, 960 F.2d at 1030.
[146] *Id*.
[147] *Petrella*, 134 S. Ct. at 1974.
[148] *Aukerman*, 960 F.2d at 1030.
[149] *Id*.
[150] 35 U.S.C. § 286 (2012).
[151] *Petrella*, 134 S. Ct. at 1974.
[152] Dennis Crouch, *Federal Circuit Defies Supreme Court in Laches Holding*, PATENTLY-O (Sept. 21, 2014), http://patentlyo.com/patent/2014/09/federal-supreme-holding.html.

explained in further detail below, the Federal Circuit in *SCA Hygiene* incorrectly determined that *Petrella* did not apply and that the *Aukerman* decision remains good law.

The Court in *Petrella* could not have been clearer that the Federal Circuit's first line of reasoning, that laches may be applied within a timeframe prescribed by a statute of limitations, was faulty. In fact, the Court explicitly stated in the first paragraph of its opinion that "[t]o the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period . . . courts are not at liberty to jettison Congress' judgment on the timeliness of suit."[153] The Court later reasoned that this is because a statute of limitations "itself takes account of delay."[154] Since laches is a "gap-filling, not legislation-overriding" device, laches is not properly applied when a statute has a statute of limitations.[155] Thus, *Petrella* has directly and completely undermined the Federal Circuit's first line of reasoning from *Aukerman*.

While the Federal Circuit's second line of reasoning was more involved and may appear to have more merit, it is also completely undermined by *Petrella*. As the Federal Circuit correctly observed, § 286 of the Patent Act is not a statute of limitations, in that it does not bar a suit for infringement.[156] However, it is still a statute of limitations because Congress has prescribed a six-year limitation on damages.[157] In fact, the Federal Circuit itself recognized that § 286 is still a type of statute of limitations when it stated that "section 286 is not a statute of limitations *in the sense of barring a suit for infringement*."[158] By recognizing that § 286 was not a statute of limitations "in the sense of barring a suit for infringement," the court is implicitly stating that it is still a statute of limitations, though in a different sense. In light of Congress' decision to enact § 286, the

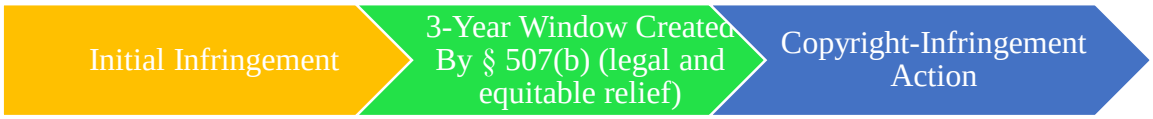
[153] *Petrella*, 134 S. Ct. at 1967.
[154] *Id.* at 1973.
[155] *Id.*
[156] A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1030 (Fed. Cir. 1992) (en banc).
[157] *See* 35 U.S.C. § 286 (2012).
[158] *Aukerman*, 960 F.2d at 1030 (emphasis added).

application of the equitable defense of laches by the courts would improperly override the intent of the statute by "setting a time limit other than the one Congress prescribed."[159] As stated by *Petrella*, "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[160] Section 286 is a statute of limitations, no matter which "sense" the Federal Circuit would like to view it in, so courts should not be able to apply laches to limit a patentee from collecting six years of prefiling damages. Even though the Patent Act does not have a statute of limitations that bars the suit entirely (as in § 507(b) of the Copyright Act), a court cannot elect to fill the "legislative hole" and invoke laches to bar the suit when doing so would bar the six years of legal relief explicitly provided for by Congress when it enacted § 286.

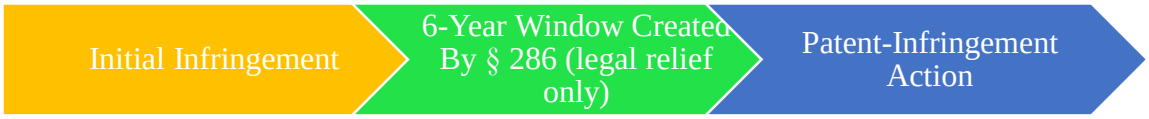
Section 286 of the Patent Act[161] and § 507(b) of the Copyright Act[162] both represent statutory windows created by Congress to limit recovery by the owner of the intellectual property. Although § 507(b) of the Copyright Act limits all relief, both legal and equitable and § 286 of the Patent Act only limits legal relief, the two statutes are nonetheless statutorily-prescribed limitations. In both statutes, Congress created a window for the recovery of legal relief, a window in which the courts should not attempt to close with equitable remedies.[163] The following timelines demonstrate the operation of both statutes:

Copyright Infringement - § 507(b):

[159] *Petrella*, 134 S. Ct. at 1975.
[160] *Id.* at 1974.
[161] 35 U.S.C. § 286 (2012). Section 286 provides in relevant part "no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." *Id.*
[162] 17 U.S.C. § 507(b) (2012). Section 507(b) provides in relevant part "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." *Id.*
[163] *Petrella*, 134 S. Ct. at 1967 ("To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period . . . courts are not at liberty to jettison Congress' judgment on the timeliness of suit.").



Patent Infringement - § 286:



Section 507(b) "bars relief of any kind for conduct occurring prior to the three-year limitations period."[164] Section 286 does not bar "relief of any kind," but does "limit recovery to damages for infringing acts committed within six years of the date of the filing of the infringement action."[165] As the timelines illustrate, the function of the two statutes is the same – to limit the recovery of the claimant. For copyright infringement, an alleged infringer may infringe at any point within the orange box labeled "initial infringement," but the copyright owner can seek relief *of any kind* for infringements occurring within the three-year window created by § 507(b), as depicted by the green box. Similarly for patent infringement, an alleged infringer may initially infringe at any point within the orange box, but a patentee can only bring suit *for damages* within the 6-year window created by § 286, as depicted by the green box.

Both statutes represent an express decision by Congress to limit the amount of legal relief available to an owner of intellectual property, six years for patent owners and three years for a

[164] *Id.*
[165] A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1030 (Fed. Cir. 1992) (en banc).

copyright owner.[166] Admittedly, § 507(b) also limits equitable remedies; however, it also limits legal relief. An important element of the Court's holding was "the ongoing separation of legal and equitable remedies."[167] As stated by the majority in *Petrella*, the "principal application [of laches] was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation."[168] Invoking the equitable defense of laches to bar legal relief would improperly constrict the six-year window in § 286 of the Patent Act and would set "a time limit other than the one Congress prescribed."[169] The *Petrella* opinion is not limited to "true" statutes of limitations, which bar all forms of relief, both legal and equitable. The Court made this clear when it stated that the Court "adhere[s] to the position that, in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[170] The Federal Circuit cannot sidestep *Petrella* by invoking laches to bar the entire suit or any equitable remedies because the Patent Act's statute of limitations is only directed toward legal relief. This is because invoking laches would bar the six years of legal relief explicitly provided for by Congress when it enacted § 286. Thus, applying laches against a claim for damages in a patent-infringement suit would impermissibly bar a patentee's claim for legal relief, which is in direct opposition to both the statute and *Petrella*.

B. The Separate-Accrual Rule Links Patent And Copyright Infringement

[166] Todd Vare, *"Raging Bull" Copyright Opinion May Impact Patent Cases*, LAW 360 (May 27, 2014 12:30PM), http://www.law360.com/articles/541533/raging-bull-copyright-opinion-may-impact-patent-cases ("Although worded differently, the effect of Section 507(b) and Section 286 is the same: A plaintiff can only recover damages for acts of infringement occurring within the statutorily prescribed number of years prior to the filing of the lawsuit.").
[167] Dennis Crouch, *Federal Circuit Defies Supreme Court in Laches Holding*, PATENTLY-O (Sept. 21, 2014), http://patentlyo.com/patent/2014/09/federal-supreme-holding.html (discussing the impact of *Petrella* on patent law).
[168] *Petrella*, 134 S. Ct at 1973.
[169] *Id*. at 1975.
[170] *Id*. at 1974.

The separate-accrual rule, which applies to both patent infringement[171] and copyright infringement[172] further demonstrates § 286 of the Patent Act and § 507(b) of the Copyright Act should be treated similarly. The separate-accrual rule states that "when a defendant commits successive violations, the statute of limitations runs separately from each violation."[173] Thus, "[e]ach wrong gives rise to a discrete 'claim' that 'accrues' at the time the wrong occurs."[174] Applying this to the above timelines, any infringement that occurs within the orange box is outside of recovery for the plaintiff, but since both patent infringement and copyright infringement are continuing torts[175] that apply the separate-accrual rule, all violations occurring within the green boxes of the timelines can be recovered by the plaintiff because each claim separately accrues.[176] Thus, recovery of damages for infringements that accrue within the green box is consistent with the language of § 286, which provides that "no recovery shall be had for any infringement committed for than six years prior to the filing of the complaint or counterclaim for infringement in the action."[177]

As noted by *Petrella*, it is the combination of the separate-accrual rule and the three-year window created by § 507(b) of the Copyright Act, that entitled Petrella to damages.[178] The plaintiff-appellant in *Aukerman* made this exact argument, but unfortunately for Aukerman, the Federal Circuit rejected it.[179] Importantly, *Aukerman*, which predated *Petrella*, did not have the

[171] A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1031 (Fed. Cir. 1992) (en banc).
[172] *Petrella*, 134 S. Ct at 1969.
[173] *Id.*; *accord Aukerman*, 960 F.2d at 1031.
[174] *Petrella*, 134 S. Ct. at 1969.
[175] *Id.* (noting that copyright infringement is a continuing tort); *Aukerman*, 960 F.2d at 1031 (noting that patent infringement is a continuing tort).
[176] *Petrella*, 134 S. Ct. at 1969; *Aukerman*, 960 F.2d at 1031.
[177] 35 U.S.C. § 286 (2012).
[178] *Petrella*, 134 S. Ct. at 1973.
[179] *Aukerman*, 960 F.2d at 1031 ("Aukerman asserts that it is improper to utilize laches as a defense to completely bar recovery of prefiling damages flowing from a continuing tort, such as patent infringement.").

benefit of the *Petrella* opinion to guide its reasoning.[180] *Petrella* would have supplied the requisite Supreme Court precedent to support plaintiff-appellant Aukerman's argument. Thus, the separate-accrual rule further illustrates why § 286 of the Patent Act and § 507(b) of the Copyright Act should be treated similarly.

C. Public Policy Also Supports Guaranteeing Six Years Of Prefiling Damages

In addition to the text of the statute and black letter law, public policy also guided the Supreme Court's decision in *Petrella*.[181] The Court in *Petrella* noted that "[i]t is hardly incumbent on copyright owners . . . to challenge each and every actionable infringement."[182] The Court reasoned that some infringements may actually benefit the copyright owner and that "there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even compliments it."[183] Even in situations where the infringement is potentially harmful, "the harm may be too small to justify the cost of litigation."[184]

Similarly in patent law, in the absence of laches, a patentee has no duty to exploit or enforce his patent rights. Just as in copyright law, some patent infringements may be beneficial to the patent owner. For example, a patentee may have a patent over a wireless mouse. A laptop computer manufacturer with a very small market share may manufacture and sell a laptop computer with the USB-attachment required to use the patentee's mouse embedded within the

[180] *Aukerman* relied on the lack of Supreme Court precedent which failed to apply laches to a continuing tort. *Id.*
[181] *See Petrella*, 134 S. Ct. at 1976.
[182] *Id*.
[183] *Id*.
[184] *Id*.

laptop itself but not the mouse itself. This would likely cause consumers to purchase the patentee's mouse because they would not have to occupy an external USB port for the use of a different wireless mouse. In this example, the laptop computer manufacturer infringed the patent, but it also expanded the market for the patentee's wireless mouse, which is beneficial to the patentee because the patentee will be able to sell more of its patented product. Public policy would not support requiring this patentee to enforce its patent.

Also, the extreme expense associated with patent litigation supports the conclusion that a patentee should not be forced to enforce his patents. In its 2013 Report of the Economic Survey, the American Intellectual Property Law Association (AIPLA) estimated that a patent-infringement suit with less than $1 million at stake cost $350 thousand dollars through the end of discovery and $700 thousand through the end of trial.[185] Obviously, if the cost of litigation is $700 thousand, it would not make financial sense to challenge small infringements that might be harmful. This is especially true since the $700 thousand figure does not represent the cost of appeal.

The separate-accrual rule in combination with the six-year limitation on damages provided in § 286 of the Patent Act allows *Petrella* to extend into patent law. If *Petrella* had been decided before *Aukerman,* it is likely that the Federal Circuit would have agreed with the arguments made by Aukerman and concluded that laches cannot prevent a patentee from recovering six years of prefiling damages. Public policy and Supreme Court precedent support this conclusion. Subsequent to *Petrella*, a patentee should be guaranteed damages for the most recent six years as a result of the separate-accrual rule in combination with the statute of limitations prescribed by Congress in § 286 of the Patent Act.

[185] AIPLA, *2013 Report of the Economic Survey*, available at http://library.constantcontact.com/download /get/file/1109295819134-177/AIPLA+2013+Survey_Press_Summary+pages.pdf.

VI. Conclusion

The Supreme Court should grant certiorari on the *SCA Hygiene* case because, as this Comment explained in Part V, the *Petrella* decision will inevitably impact patent jurisprudence. Alternatively, the Federal Circuit should be proactive and rehear the *SCA Hygiene* case en banc. This could spare the Federal Circuit another "slap"[186] from the Supreme Court, and avoid another Supreme Court opinion stating that the Federal Circuit "fundamentally misunderstands"[187] the Supreme Court's precedent. Either way, it is important that lower courts understand the clear implications of the *Petrella* decision.

It is unjust for patentees who have waited to sue longer than six years to be barred from recovery under § 286 of the Patent Act by laches when the Supreme Court in *Petrella* made clear that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[188] Since patent infringement and copyright infringement are continuing torts that apply the separate-accrual rule and there is a statute of limitations in both the Patent Act and the Copyright Act, laches should be applied in the same way, regardless of the intellectual property at issue. Therefore, to avoid injustice to patentees, the Federal Circuit should rehear the *SCA Hygiene* case en banc or the Supreme Court should grant certiorari to explicitly overrule *Aukerman* and affirmatively establish that patentees are guaranteed six years of prefiling damages under § 286 of the Patent Act.

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[186] Daniel Fisher, Supreme Court Slaps Loose Business-Method Patents, Federal Circuit In Rulings, FORBES, (June 2, 2014, 4:34 PM), http://www.forbes.com/sites/danielfisher/2014/06/02/supreme-court-slaps-loose-business-method-patents-federal-circuit-in-rulings/ (reporting that the Supreme Court "slap[ped]" the Federal Circuit for its recent decision in *Limelight Networks v. Akamai*).

[187] Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111, 2117 (2014) (noting that "[t]he Federal Circuit's analysis fundamentally misunderstands what is means to infringe a method patent").

[188] *Petrella*, 134 S. Ct. at 1974.

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