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A circuit split in copyright law: Will the Supreme Court resolve it?

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Last month, the Eleventh Circuit deepened a split among the federal Courts of Appeals on an important issue in copyright law: Under the discovery rule, can plaintiffs recover for infringements that occurred more than three years before suing?

The Copyright Act provides that "[n]o civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). But when does an infringement claim accrue? Courts have adopted two accrual rules for such claims. Under the "incident of injury" rule, the claim accrues each time the infringement occurs, and the statute of limitations runs separately from each violation. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014). By operation of this "separate-accrual" rule, a plaintiff can recover damages for only infringements that occurred within three years of suing. *Id.* Under the discovery rule, by contrast, "a claim for copyright infringement may occur when the copyright owner discovers, or reasonably should have discovered, the infringement." *Starz Ent'mt, LLC v. MGM Domestic Tel. Dist. LLC*, 39 F.4th 1236, 1240 (9th Cir. 2022). For such claims, the statute of limitations runs once, from when the plaintiff knew or should have known of the infringement.

The Courts of Appeals are divided about whether, under the discovery rule, plaintiffs can recover for infringements that occurred more than three years before suing. In 2020, the Second Circuit held in *Sohm v. Scholastic, Inc.*, 959 F.3d 39 (2d Cir. 2020) that, for claims that accrue under the discovery rule, "a plaintiff's recovery is limited to damages incurred during the three years prior to filing suit." *Id.* at 53. But last July, in *Starz Entertainment, LLC v. MGM Domestic Television Distribution LLC*, the Ninth Circuit split with the Second Circuit, holding that "the discovery rule for accrual allows copyright holders to recover damages for all infringing acts that occurred before they knew or reasonably should have known of the infringing incidents." 39 F.4th at 1244 (emphasis added). Late last month, the Eleventh Circuit joined the Ninth Circuit on its side of the split. *Nealy v. Warner Chappell Music, Inc.*, ___ F.4th ___, 2023 WL 2230267, at *1 (11th Cir. 2023). The stakes are significant in resolving this split. Now, plaintiffs seeking to recover for infringements occurring more than three years from suing have an incentive to sue in the Ninth or Eleventh Circuits, and to avoid the Second Circuit where such relief is barred.

It remains to be seen whether the Supreme Court will step in to resolve this split. (In *Starz*, the parties settled after the Ninth Circuit denied MGM's petition for rehearing *en banc*.) The issue is ripe. Not only is there a clear split – expressly recognized by the Courts of Appeals, *see id.* at *1 (the issue "has divided [its] sister circuits") – but the split was itself caused by a prior Supreme Court opinion: *Petrella*.

In *Petrella*, the Court stated that "[u]nder the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is *insulated from liability* for earlier infringements of the same work." *Id.* at 671 (citing 3 M. Nimmer & D. Nimmer, Copyright § 12.05[B][1][b], p. 12-150.4 (2013)) (emphasis added).

The Courts of Appeals do not agree that this language is binding. The Second Circuit determined it was, stating that *Petrella* "explicitly delimited damages to the three years prior to the commencement of a copyright infringement action." 959 F.3d at 51. The Ninth and Eleventh Circuits concluded, however, that the *Petrella* language is not controlling, for two reasons. First, they noted that the question the *Petrella* court answered was whether the laches defense can bar relief on an infringement claim brought within § 507(b)'s three-year limitations period. *Starz Ent'mt*, 39 F.4th at 1241; *Nealy*, 2023 WL 2230267, at *5. The Ninth and Eleventh Circuits also reasoned that the Court stated in *Petrella* that it has "not passed on [i.e., has not decided] the question" whether the discovery rule applies to copyright claims. *Starz Ent'mt*, 39 F.4th at 1242; *Nealy*, 2023 WL 2230267, at *6.

If the Supreme Court decides to resolve this circuit split, the Court may simply clarify whether the 3-year relief bar for incident-of-injury rule claims that the Court recognized in *Petrella* also applies to discovery rule claims. But the Court could also consider a related foundational issue: Whether the discovery rule applies to copyright infringement claims at all. As the Court in *Petrella* noted, nine Courts of Appeals have adopted that rule for copyright claims, and "[t]he overwhelming majority of courts use discovery accrual in copyright cases." *Petrella*, 572 U.S. at 670 n.4. But the Court has acknowledged it has never decided that issue – and squaring that issue with its language in *Petrella* has prompted disagreement among the Courts of Appeals. If certiorari is sought, *Nealy* may be an apt opportunity for the Court to decide that critical issue as well.

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