

The Supreme Court contemplates a 3-year copyright damages bar

Warner Chappell Music, Inc. v. Nealy could affect the incentives and challenges for copyright owners to monitor and enforce their rights, as well as the potential for abuse and nuisance lawsuits by plaintiffs.

By Meredith L. Williams

On Feb. 21, the Supreme Court heard oral argument in *Warner Chappell Music, Inc. v. Nealy*, a case that could impact whether a plaintiff who belatedly discovers copyright infringement may obtain decades of damages, or only three years.

This case appeals an Eleventh Circuit holding that “a copyright plaintiff may recover retrospective relief for infringement occurring more than three years before the lawsuit’s filing so long as the plaintiff’s claim is timely under the discovery rule.” *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1331 (11th Cir. 2023), cert. granted in part, 144 S. Ct. 478 (2023) (*Nealy*). The opinion sides with the Ninth Circuit in disagreeing with *Sohm v. Scholastic Inc.*, in which the Second Circuit imposed “a three-year lookback period from the time a suit is filed to determine the extent of the relief available.” 959 F.3d 39, 52 (2d Cir. 2020) (*Sohm*). The three-year bar in *Sohm* arguably preserves the effectiveness of the statute of limitations, but conflicts with the purpose of the discovery rule. Per the Ninth Circuit: “There is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable.” See *Starz Ent., LLC v. MGM Dom. TV Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022).

Strangely enough, although Petitioner presented a question that was silent on the discovery rule (Writ of Certiorari Petition), the



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Supreme Court changed that question to assume such a rule applies: “Whether, under the discovery accrual rule applied by the circuit courts and ... 17 U.S.C. §507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before [filing].” See Grant of Petition in Case No. 22-1078 (Sep. 29, 2023). As Justice Alito observed at oral argument, this skips over the initial question of whether there is a discovery rule, to the implications for relief, but it makes little sense to talk about the latter without resolving the former. Justice Gorsuch noted this is “a curiosity of this case,” i.e. that the justices are “to decide the scope of

something that may or may not exist.”

Courts of Appeals have adopted the discovery rule although the relevant statute does not state whether a claim accrues when infringement “occurred” or was “discovered.” See 17 U.S.C. 507(b) (“No civil action shall be maintained ... unless it is commenced within three years after the claim accrued.”). Only the Second Circuit in *Sohm* has held that a three-year look-back period is required by the Supreme Court’s statements in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677 (2014) (“[A] successful plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringe-

ment in earlier years.”) (*Petrella*). See 959 F.3d 39, 52 (2d Cir. 2020) (*quoted supra*).

Whether or not this three-year look-back bar exists has significant policy implications, as *amicus curiae* briefs examined. For example, the Electronic Frontier Foundation *et al.* (EFF) lamented that allowing damages to “accrue for a potentially unlimited time period before suit is filed” would “throw gasoline on the fire of copyright trolling, encouraging nuisance lawsuits” for “ancient damages” claims. EFF Brief, pp. 13-15. Meanwhile, The Authors Guild, Inc. *et al.* (TAG) argued against any three-year damages bar to protect artists’ rights, as American artists

“struggle to police infringers.” TAG Brief, p. 18. Notably, The American Intellectual Property Law Association (AIPLA) implicitly addressed both concerns, arguing both that imposing a three-year damages bar in discovery accrual cases would unfairly prejudice individual rights-holders, and that the Court should limit its ruling to “ownership” cases and remind district courts to serve as gatekeepers against abuse of the judiciary. AIPLA Brief at pp. 17-20.

On the merits, Respondent has the better arguments against a three-year bar, namely: (1) *Petrella* did not address claim accrual under the discovery rule; and (2) Congress knows how to write a three-year damages bar, which 17 U.S.C. 507(b) is not.

First, *Petrella* focuses on the injury/occurrence rule, with the majority opinion only mentioning the discovery rule in a footnote. See *Petrella*, 572 U.S. at 670 & n. 4 (2014) (discussing copyright claim accrual

“when an infringing act occurs,” noting “[n]ine Courts of Appeals have adopted, as an alternative ... a ‘discovery rule.[.]’”). Thus, the Eleventh Circuit correctly surmises that *Petrella*’s “statements about the availability of relief are directed to the way the statute of limitations works when claims accrue under the injury rule, not the discovery rule.” *Nealy*, 60 F.4th at 1331.

Second, 17 U.S.C. §507(b) does not expressly limit damages, but another part of Title 17 does. Respondent’s Brief, pp. 9-10. Specifically, Congress barred old damages for infringements of vessel hull designs under Chapter 13 of the same title. See 17 U.S.C. § 1323(c) (“No recovery ... shall be had for any infringement committed more than 3 years before the date on which the complaint is filed.”)). Congress even put this express three-year bar in place at the same time it amended Section 507(a) in the same title, leaving Section 507(b)

as it was. See TAG Brief, p. 11 (citing Pub. L. 105-304, title I, § 102(e), Oct. 28, 1998, 112 Stat. 2863). Hence, Congress knew how to write a three-year bar on damages but left regular copyright infringement actions without such a bar. Ralph Oman, former Register of Copyrights, makes a similar point based on an even earlier statutory amendment. Oman Brief, pp. 8-9 (noting 1957 bill with express language barring recovery “for any infringement committed more than three years prior to the filing of the complaint,” H.R. 8873, Section 23(b), was “not incorporated into the text of Section 507(b), even though Congress was considering that text simultaneously.”).

As the Copyright Act has no three-year lookback bar for damages, the most likely outcome is to affirm *Nealy*. Without an injury rule or three-year lookback bar limiting nuisance actions, the Court should indeed carefully limit its ruling to “ownership” cases to avoid exacer-

bating trolling abuse. AIPLA Brief at pp. 19-20. Practitioners should also be aware of the authorities for that critical distinction.

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