CLEARY GOTTLIEB

ALERT MEMORANDUM

Supreme Court Allows Copyright Damages Dating Back More Than Three Years (*If* The Discovery Rule Applies)

May 15, 2024

Last week, a divided Supreme Court held in *Warner Chappell Music, Inc. et al. v. Nealy et al.* that a copyright plaintiff who timely files an infringement lawsuit based on the "discovery rule" may recover damages for infringements that occurred outside the Copyright Act's three-year statute of limitations period.[1] A claim generally accrues when an infringing act occurs, but many circuits apply a "discovery rule," pursuant to which a claim accrues when a plaintiff has (or with reasonable diligence should have) discovered the infringement, which could be many years later. Courts applying this rule have recently disagreed on how far back damages are available, with the Second Circuit holding that a copyright claimant may recover only three years' of damages, even if the suit was otherwise timely under the discovery rule. The Supreme Court rejected that conclusion, holding that "no such limit on damages exists" in the Copyright Act, which "entitles a copyright owner to recover damages for any timely claim" no matter when the infringement occurred.

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The Court deferred the bigger question—whether the "discovery rule" should apply at all—for another day. But litigants may not have to wait long for further clarity. In a separate case, the Court is considering whether to grant certiorari on this very issue.

[1] 2024 WL 2061137 (U.S. May 9, 2024).

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Background

In 2018, Sherman Nealy sued Warner Chappell for copyright infringement based on decade-old acts of purported infringement. In 1983, Mr. Nealy and his former business partner, Tony Butler, formed a music company that released one album and several singles before it dissolved in 1986. Mr. Nealy went to prison from 1989 to 2008 and again from 2012 until 2015 for certain drug-related offenses.

Meanwhile, Mr. Butler entered into an agreement with Warner Chappell Music to license some of the company's works. One such song was used in Flo Rida's hit recording "In the Ayer," which sold millions of copies and reached No. 9 on the Billboard music chart. Other of the company's songs were incorporated into recordings by the Black Eyed Peas, among others.

While the purported infringing uses dated back to 2008, Mr. Nealy reportedly only became aware of the infringement in 2016, after his second term in prison, and brought suit in 2018. The District Court for the Southern District of Florida granted partial summary judgment for Warner Chappell, holding that Nealy could not recover damages for infringement that occurred more than three years before he filed suit.[2] Under the Copyright Act a plaintiff must file suit "within three years after the claim accrued."[3] On interlocutory appeal, the Eleventh Circuit reversed, holding that in an ownership dispute, the "discovery rule" of claim accrual allows a plaintiff to recover damages for infringement occurring prior to the three year limitations period. Thus, Nealy could seek to recover damages going back to 2008.

Courts have generally applied the "discovery rule" to copyright infringement claims, but in recent years a circuit split has emerged over what this means when calculating damages. On one hand, the Second Circuit has held that the Copyright Act's statute of limitations barred a plaintiff from recovering damages incurred more than three years before filing of the complaint.[4] On the other hand, the Ninth[5] (and now Eleventh) Circuits have held that a plaintiff who timely files suit under the "discovery rule" may seek damages based on the entire course of a defendant's infringement. The Supreme Court granted certiorari in the instant case to resolve this Circuit split.

The Supreme Court's Ruling

In a 6 to 3 decision, Justice Kagan, writing for the majority, confirmed the Ninth and Eleventh Circuits' approach. The Court held that "a copyright owner possessing a timely claim for infringement is entitled to damages, no matter when the infringement occurred."[6] This conclusion, the Court reasoned, flows from a textual reading of the Copyright Act, which imposes "no time limit on monetary recovery," so long as a claim is filed within three years of when it accrues. The Court described the Second Circuit's contrary approach as "essentially self-defeating," allowing a claim but then effectively gutting it of any monetary remedy.[7]

The majority also criticized the Second Circuit's reliance on the Court's recent decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*[8] Quoting *Petrella*, the Second Circuit had held that even under the "discovery rule," the Copyright Act's statute of limitations permits plaintiffs "to gain retrospective relief running only three years back from the date the complaint was filed."[9] The Supreme Court rejected this interpretation of *Petrella*, explaining that there was no invocation of the discovery rule in that case and, accordingly, that the statement cited by the Second Circuit merely described how the limitations provision operates when a plaintiff lacks timely claims for infringing acts that are more than three years old.[10] It was not intended to enunciate a broader rule about the availability of damages in other contexts.

[2] *Id*, at *3.
[3] 17 U.S.C. § 507(b).
[4] *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020).
[5] *Starz Ent. v. MGM*, 39 F.4th 1236 (9th Cir. 2022).
[6] *Warner Chappell*, 2024 WL 2061137 at *4.
[7] *Id*.
[8] *Id*. (citing 572 U.S. 663 (2014)).
[9] *Sohm*, 959 F.3d, at 51–52.
[10] *Warner Chappell*, 2024 WL 2061137 at *4.

As a result, the Court upheld the Eleventh Circuit's ruling that, if his claims were timely under the "discovery rule," Nealy was entitled to seek damages dating back to 2008.

Whether the Discovery Rule Applies at All

Importantly, the Court presumed without deciding that the "discovery rule" applies to Copyright Act cases and explicitly did not reach a decision on when a claim "accrues" for purposes of the Act.

In its petition for certiorari, Warner Chappell tried to frame the question more broadly to include "[w]hether the Copyright Act's statute of limitations for civil actions, 17 U.S.C. 507(b), precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit."[11] But the Court narrowed the question because application of the "discovery rule" was not challenged or briefed below.

At oral argument, members of the Court recognized that this was the salient issue and contemplated whether to dismiss this petition as improvidently granted. Justice Alito described two questions: "Is there a discovery rule? If there is, what are its implications for relief? The first is logically prior to the second. Why does it make sense to talk about the second without resolving the first?"[12]

In his dissent, Justice Gorsuch, joined by Justices Thomas and Alito, criticized the majority for "sidestep[ping] the logically antecedent question" of whether the discovery rule applies at all under the Copyright Act.[13] The dissent went further to suggest that the discovery rule should not apply, questioning why the majority "expound[ed] on the details of a rule of law that…very likely does not exist" and answered a question that "almost certainly does not" matter rather than waiting to answer one that does—whether the discovery rule applies at all.[14]

Takeaways

While this decision resolves the circuit split and provides some certainty as to what damages are available under the "discovery rule," it leaves unanswered the bigger question as to whether the rule applies at all to Copyright Act claims. The dissent cast significant doubt on that assumption, and even the majority cautioned that the Court has "never decided whether that assumption is valid."[15]

The decision may also be short-lived. Hearst Newspapers L.L.C. and Hearst Magazine Media, Inc. have petitioned the Court on this exact issue.[16] Should the Court grant certiorari, it is possible a majority will determine that the "discovery rule" does not generally apply in Copyright Act cases. In their dissent, Justices Gorsuch, Thomas and Alito seem prepared to rule that way, emphasizing that "[u]nless the statute at hand directs otherwise, we proceed consistent with traditional equitable practice and ordinarily apply the discovery rule only in cases of fraud or concealment."[17] Whether any of the Justices in the majority would likewise so find remains to be seen, but given how they went out of their way to highlight the narrowness of the decision, it cannot be ruled out.

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[11] Pet. for a Writ of Certiorari at (I), *Warner Chappell v. Nealy*, No. 22-1078 (U.S. May 3, 2023).
[12] Tr. of Oral Arg., at 18 *Warner Chappell v. Nealy*, 601 U.S. ---- (2024) (No. 22-1078).
[13] *Warner Chappell*, 2024 WL 2061137 at *5 (Gorsuch, J., dissenting).
[14] *Id*. at *6 (Gorsuch, J., dissenting).
[15] *Id*. at *3.
[16] Pet. for a Writ of Certiorari, *Hearst Newspapers L.L.C., et al. v. Antonio Martinelli*, No. 23-474 (U.S. Nov. 2, 2023).
[17] *Warner Chappell*, 2024 WL 2061137 at *5 (Gorsuch, J., dissenting) (internal quotations omitted).