Has the Supreme Court Declared Open Season for Copyright Trolls? Perhaps Not

By David H. Levitt, Thaddeus W. Juilfs and Kate Scalaro

Do you have an annual fish fry or pancake breakfast to promote? Archiving an old newsletter on your website? If that material includes images taken from the internet – even if it was seemingly borrowed from a "free" site, a recent ruling by the U.S. Supreme Court may have declared open season for copyright trolls to bring claims arising out of that content – regardless of how long ago the image was used.

DECISIONS, DECISIONS . . .

During the 2024 term, the Supreme Court ruled that the three-year statute of limitations under 17 U.S.C. §507(b) did not bar claims by a copyright owner possessing a timely claim for infringement for damages, no matter when the infringement occurred (in the case at issue, some infringements had occurred ten years earlier).[1] The main issue: whether the claim is "timely." The basis of the Court's determination of timeliness: application of the "discovery rule" – which holds that a claim accrues a claim accrues when the plaintiff discovers, or with due diligence should have discovered, the infringing act.

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Thus, in its last two decisions on the timeliness of copyright claims, the Supreme Court has allowed the claims. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*,[2] the Court rejected application of laches, holding that existence of a statutorily created time limit was the only permissible limitation. In *Sherman Nealy*, the Court allowed claims for infringing acts far longer in the past than three years, expressly allowing claims "no matter when the infringement occurred."

The range of possible claims, therefore, is potentially limitless. We have seen claims, for example, of a non-profit charitable organization that published a picture of its newsletter more than a decade ago, but archived a copy of that newsletter on its website for its members. Troll bots found the image, and the copyright infringement demand letter soon followed.

IS IT OPEN SEASON FOR COPYRIGHT TROLLS?

So, is it open season for copyright trolls? Not so fast. Both the *Petrella* (in footnote 4) and *Sherman Nealy* Courts expressly noted that the Court had not yet evaluated the viability of the discovery rule for application in copyright claims. The discovery rule was never potentially at issue in *Petrella*, as the plaintiff filed suit some 18 years after discovering the alleged infringement – and the "separate-accrual rule" (each infringing act starts a new limitations period for that act) applied. But the separate-accrual rule was not at issue in *Sherman Nealy*; it therefore turned on the application of the discovery rule for infringing acts that occurred before the three-year "look back period."

Most importantly, the *Sherman Nealy* majority *declined* to consider whether the discovery rule was correctly used, stating: "But that issue is not properly presented here, because Warner Chappell never challenged the Eleventh Circuit's use of the discovery rule below."

The three-Justice dissent strongly disagreed:

> The trouble is, the [Copyright] Act almost certainly does not tolerate a discovery rule. . . . It starts the limitations period when the plaintiff discovers, or with due diligence should have discovered, the injury that forms

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> the basis for the claim. We have said, however, that the rule is not applicable across all contexts. Far from it: Unless 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. We have long warned lower courts, too, against taking any more expansive approach to the discovery rule. . . . The discovery rule thus has no role to play here—or indeed, in the mine run of copyright cases. (Internal quotations omitted).

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For those in lower courts, however, the discovery rule remains firmly in place in the absence of a definitive Supreme Court ruling. Nearly all Circuit Courts have ruled in favor of the discovery rule.[3]

Even where the discovery rule applies, however, all is not lost for defendants. The discovery rule requires analysis not only of when the plaintiff claims to have discovered the alleged infringement, but when the plaintiff *should* have discovered the infringing act in the course of due diligence. At least one case has applied that principle to bar a copyright infringement claim. In *Minden Pictures, Inc. v. Complex Media, Inc.*,[4] the court granted a motion to dismiss on a claim arising out of an infringing act nearly ten years earlier, finding that "a reasonable copyright holder in Minden Pictures' position – that is, a seasoned litigator that has filed 36 lawsuits to protect its copyrights, beginning as early as July of 2010 – should have discovered, with the exercise of due diligence, that its copyright was being infringed within the statutory time period."

Many copyright owners – at least those in the business of trolling the internet to find unauthorized uses of their images, music, or otherwise copyrighted works – have systems in place to search for such uses. Parties faced with demands from such owners, whether pre-suit or in litigation, have every reason to seek information related to the claimant's due diligence.

Even more basically, defendants must take steps that the defendant in *Sherman Nealy* did not – assert, brief, and preserve the issue of whether the discovery rule applies at all. It might mean losing on the issue in lower courts and someone eventually bringing the issue to the Supreme Court, but the scope of liability and damages exposure of small businesses and non-profit organizations for long-ago use of accused images is large enough to justify preserving the issue. If nothing else, asserting and preserving the issue will be another argument that targets can use to justify a more reasonable settlement value.

TAKEAWAYS

Takeaways for potential copyright defendants:

1. Avoid potential liability in the first place. Content on the internet is almost never free to use. Train your staff not to borrow items from the internet for any purpose.

2. If a claim arises, preserve the issue of viability of the discovery rule to copyright cases.

3. Attack the applicability of the discovery rule in the particular case – seek information and discovery on systems used by the claimant to locate potential infringements and on the claimant's due diligence.

Notes

1. Warner Chappell Music, Inc. v. Sherman Nealy, 601 U.S. ___, 144 S. Ct. 1135 (2024).
2. 572 U.S. 663 (2014).
3. Warren Freedenfeld Assocs. v. McTigue, 531 F.3d 38, 44 (1st Cir. 2008); Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 124 (2d Cir. 2014); William A. Graham Co. v. Haughey, 568 F.3d 425, 437 (3d Cir. 2009); Lyons P'ship, Ltd. P'ship v. Morris Costumes, Inc., 243 F.3d 789, 796 (4th Cir. 2001); Martinelli v. Hearst Newspapers, L.L.C., 65 F.4th 231, 235 (5th Cir. 2023); Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC, 477 F.3d 383, 390 (6th Cir. 2007); Gaiman v. McFarlane, 360 F.3d 644, 653 (7th Cir. 2004); Comcast of Ill. X v. Multi-Vision Elecs., Inc., 491 F.3d 938, 944 (8th Cir. 2007); Polar Bear Prods.,

Inc. v. Timex Corp., 384 F.3d 700, 706 (9th Cir. 2004); Diversey v. Schmidly, 738 F.3d 1196, 1200 (10th Cir. 2013); Nealy v. Warner Chappell Music, Inc., 60 F. 4th 1325, 1330 (11th Cir. 2023); see also Arellano v. McDonough, 1 F. 4th 1059 (Fed. Cir. 2021) (Equitable tolling not available for 38 U.S.C. § 5110(b)(1), but dissent recognizing that section 507(b) has been subject to the discovery rule or "equitable tolling" in other jurisdictions); Oppenheimer v. WI Magazine Group, No. 20-1451(ABJ), 2021 U.S. Dist. LEXIS 253382, at *6 (D.D.C. Mar. 4, 2021) ("While the DC Circuit has yet to address the question, the courts in this district that have applied the statute of limitations in the Copyright Act have also employed the discovery rule.").

4. 2023 U.S. Dist. LEXIS 52070, 2023 WL 2648027 (S.D.N.Y. March 27, 2023).

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