

Second Circuit Limits Copyright Damages To Those Incurred Within Three Years Prior to Suit

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While the Copyright Act has a three-year statute of limitations, most courts follow the “discovery rule,” pursuant to which “an infringement claim does not ‘accrue’ until the copyright holder discovers, or with due diligence should have discovered, the infringement.” *See, e.g., Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (quoting 17 U.S.C. § 507(b)). It is the defendant’s burden to prove whether the plaintiff knew or should have known about the alleged infringement more than three years before it filed suit. Therefore, it is often difficult to dismiss a copyright infringement claim on statute of limitations grounds prior to costly discovery. This has presented a significant advantage to a plaintiff who raises a claim for infringement more than three years after the allegedly-infringing behavior has ceased. Yesterday, the Second Circuit issued a [decision](#) which more evenly balances the equities in late-filed copyright infringement claims.

In *Sohm v. Scholastic Inc.*, No. 18-2110, 2020 WL 2375056 (2d. Cir. May 12, 2020), the Court found, among other things, that monetary damages in a copyright infringement suit are limited to those incurred in the three years preceding the commencement of suit.

In *Sohm*, professional photographer Joseph Sohм and one of his agencies sued Scholastic Inc. in the Southern District of New York for, among other things, alleged copyright infringement of 89 of his photographs. The district court granted in part and denied in part the parties’ cross-motions for partial summary judgment. On appeal, Sohм and Scholastic each raised various challenges to the district court’s order. Most significantly, Scholastic argued that the district court erred in: (1) applying the “discovery rule,” and not the “injury rule,” to determine when the plaintiffs’ claims accrued under the statute of limitations; and (2) allowing damages that accrued more than three years prior to the date that plaintiffs filed the copyright infringement suit.

In deciding the statute of limitations issue, the district court applied the “discovery rule” and found the action was timely filed because Scholastic had failed to show any reason that Sohм should have discovered the infringing acts more than three years prior to the date it filed the complaint. The Second Circuit affirmed, rejecting Scholastic’s argument that two recent Supreme Court decisions, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017) and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S.663 (2014), cast doubt on the “discovery rule’s” applicability, because in both cases the Supreme Court specifically declined to rule on the applicability of the rule.

The Second Circuit reversed the district court’s decision regarding recovery of damages for infringement. It agreed with Scholastic that regardless of whether the discovery rule or injury rule applies for purposes of accrual of a claim, the Supreme Court’s decision in *Petrella* clearly held that

the Copyright Act limits a plaintiff's recovery to damages incurred in the three years prior to filing suit. There, the Supreme Court explained 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." *Petrella*, 572 U.S. at 671. Thus, "a successful plaintiff can gain retrospective relief only three years back from the time of suit" and that "[n]o recovery may be had for infringement in earlier years." *Id.* at 677.

This decision will be well-received by defendants in the Second Circuit who are faced with claims of copyright infringement more than three years after the allegedly-infringing behavior has ceased, such as a fashion company who is faced with an infringement claim regarding a product it has not sold for many years.

Unfortunately, since the Supreme Court's ruling in *Petrella*, most circuits, including the Ninth Circuit, have not yet squarely addressed whether copyright infringement damages should be limited to those incurred in the three years preceding suit. Some district courts in the Ninth Circuit have since suggested that damages incurred more than three years prior to suit should be permitted so long as the plaintiff had no reason to know about the infringement prior to the three-year limitations period. *See, e.g., Johnson v. UMG Recordings, Inc.*, 2019 U.S. Dist. LEXIS 184455 (C.D. Cal. Oct. 23, 2019). This presents a potential split among the circuits with respect to the availability of damages for copyright infringement outside the three-year statute of limitations.

