

## Supreme Court Decision Could Increase Copyright Trolling in the Second Circuit

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Intellectual property practitioners were anticipating the Supreme Court's decision in *Warner Chappell Music v. Nealy*, which raised important questions regarding the statute of limitations and availability of damages for stale copyright infringement claims. We [previously wrote](#) about how the Supreme Court's decision could impact copyright "trolls:" entrepreneurial plaintiffs who assert copyright infringement claims based on old, allegedly infringing uses of photographs or images on the internet to extract quick settlements from unsuspecting businesses. The Court's decision, issued earlier this month, may embolden trolls in the short term, especially in the Second Circuit. However, the hope remains that the Supreme Court will rein in the statute of limitations to discourage trolls in a future case.

*Warner Chappell Music v. Nealy* raised two potential issues: (1) whether the Copyright Act's three-year statute of limitations begins to run from the plaintiff's "discovery" of the infringement (called the "discovery" rule), and (2) whether the Copyright Act limits recoverable damages to those incurred within the three years preceding the filing of a lawsuit.

On the first issue, the Supreme Court found that the issue has not been properly raised. Thus, the Supreme Court deferred its decision on the discovery rule to a future case.

The discovery rule promotes copyright trolling by allowing plaintiffs to assert infringement claims based on when they allegedly become aware of the infringement. For example, under the discovery rule, a plaintiff can purchase the right to enforce the copyright to certain stock images in 2024, "discover" infringing uses of those images on the internet and assert a timely claim in a lawsuit, even though those images were published in 2018—more than three years prior to the lawsuit. When the right case comes before the Supreme Court, many will be rooting for the Supreme Court to limit the application of the discovery rule (for example, to instances of fraud or concealment of the infringement) to discourage trolls.

On the second issue, the Supreme Court overruled the Second Circuit's bar on stale damages, holding that it is not supported by the Copyright Act. This decision is likely to embolden copyright trolls in the Second Circuit (Connecticut, New York, and Vermont), who now have more to gain by

asserting stale claims.

The damages bar previously applied in the Second Circuit limited recovery to three years' damages even if the infringement claim was timely under the discovery rule. In the example above, even if the 2024 claim based on the 2018 infringement was timely, the plaintiff could only recover its damages for 2022, 2023, and 2024; damages for 2018-2021 were older than three years and barred. Now that the Supreme Court has overruled the damages bar, the plaintiff in the example can recover its full damages going back to 2018.

We expect to see an uptick in copyright trolls making demands on businesses in the Second Circuit, including manufacturing businesses based out of Connecticut and New York. It is important to stay abreast of the status of the law and to confer with an attorney when a demand letter from a copyright troll is received to effectively discourage and address their demands.

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