

## Delay in Bringing Suit Is No Bar to Copyright Infringement Claims

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How long does a copyright owner have to bring suit for copyright infringement? The answer is three years from the date of the last infringement, regardless of when the very first infringement occurred. Copyright law follows the “separate-accrual rule,” which provides for a new three-year statute of limitations each time an infringement occurs. While the three-year look back period allows copyright owners to maintain actions years or decades after the initial infringement occurs (assuming subsequent infringements), the copyright holder would only be entitled to damages for that three-year period, rather than the entire period of time the infringing activity had occurred.

The **Copyright Act (“Act”)**, 17 U.S.C. § 101 et seq., grants copyright protection to “original works of authorship” that are “fixed in any tangible medium of expression.” § 102(a). Copyright only extends to the expression of ideas – words, pictures, and sounds – but not to the ideas themselves. § 102(b). Copyright protection is afforded upon the fixing of an expression in a tangible medium (writing, sound recording, photograph, sculpture, etc.) and lasts, for works created after 1978, for the life of the owner plus seventy years. § 302(a). A copyright owner enjoys an exclusive bundle of rights, including the right to develop and market derivative works, to reproduce and distribute the work, and to perform or display the work publicly. § 106.

While it is advisable to include the copyright symbol (©) on newly created works, the absence of the symbol on a copyrightable work does not diminish the protections afforded under the Act. Registration of a copyright, while not required for receiving copyright protection, is nevertheless required for bringing a copyright infringement suit and for recovering attorney’s fees in a successful suit. § 411(a); § 412.

Suits for copyright infringement are subject to a three-year statute of limitations: “No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued.” § 507(b). A claim ordinarily accrues when a plaintiff has a complete and present cause of action.

In other words, limitations period generally begins to run at the point when a plaintiff can file suit and obtain relief. A copyright claim, therefore, arises or “accrues” when an infringing act occurs. Each time a defendant commits a copyright violation, the copyright owner has three years to file suit for that violation. The infringer, however, is insulated from liability for earlier infringements of the same work. Thus, each infringing act starts a new limitations period, but the infringer is not liable for

infringements that occurred more than three years prior to the filing of suit.

This means a copyright owner who has knowledge of continued infringement does not need to file suit right away, but can wait for any reason or no reason before filing suit. Such was the case in *Petrella v. MGM*, 134 S. Ct. 1962 (U.S. 2014), which concerned the critically acclaimed movie *Raging Bull*, based on the life of boxing champion Jake LaMotta. LaMotta shared his story with his good friend Frank Petrella, who filed a copyright registration for a screenplay the duo prepared in 1963.

In 1976, LaMotta and Petrella assigned their rights in the screenplay to a production company, who later sold the rights, including the right to produce a motion picture, to Metro-Goldwyn-Mayer, Inc. (“MGM”). Petrella died in 1981, whose renewal rights to the screenplay reverted to his heirs, who could renew the copyright unburdened by Petrella’s previous assignments. See *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

In 1991, Paula Petrella, Frank Petrella’s daughter and holder of the renewal rights, exercised her right and renewed the copyright in the 1963 screenplay. After waiting nearly 20 years, Paula filed a copyright infringement suit against MGM in January 2009. Given the three-year statute of limitations window, Paula sought relief only for acts of infringement occurring on or after January 2006. MGM sought summary judgment to have Paula’s complaint dismissed on the grounds of her 18-year delay in bringing suit (laches), claiming it was unreasonable and prejudicial. The district court granted summary judgment to MGM and the Ninth Circuit affirmed the laches-based dismissal.

In reversing the lower courts, the Supreme Court pointed out that the copyright statute of limitations takes account of delay by limiting a plaintiff’s damages to the three-year look-back period: profits made by the infringer in the years prior are untouchable. Prejudice to the defendant is allayed by the alleged infringer’s ability to offset profits by deducting expenses incurred in generating those profits. § 504(b). Moreover, the defendant may retain the return on investment shown to be attributable to its own initiatives, rather than value created by the infringed work, by offsetting plaintiff’s claimed damages by “elements of profit attributable to factors other than the copyrighted work.” § 504(b).

In rejecting MGM’s arguments, the Petrella Court found nothing wrong with the “wait and see” approach: “there is nothing untoward about waiting to see whether an infringer’s exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it.” Litigation is expensive, and even if an owner is aware of an ongoing infringement, the harm caused by the infringement may be too small to justify litigation.

As it stands, laches or delay is no bar to a copyright infringement suit. Should an owner have knowledge of an infringement, but wait years to institute suit, he will not be barred from seeking injunctive relief and disgorgement of profits for the three-year period preceding the filing of the complaint. This way, copyright owners can make the decision about when and whether the expenses of litigation are worth the fight.

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