

# Supreme Court Holds that Copyright Damages Can Be Awarded for Old Infringements

## The Bottom Line

- Copyright owners can recover damages for old infringements under the “discovery rule,” which permits plaintiffs to sue within three years of discovering an infringement.
- Sidestepping whether the discovery rule should apply at all, the Supreme Court held that plaintiffs may recover damages for infringements that occurred more than three years before filing suit.
- Unless the Supreme Court rejects the discovery rule – as the dissent suggests – copyright defendants will face substantial exposure for old infringements.

The Copyright Act’s statute of limitations requires a plaintiff to file suit within three years from when the claim comes into existence, or “accrues.” But when does a claim accrue?

Under the “injury rule,” a claim accrues when the infringing act occurred, regardless of when a copyright owner learns about it. In contrast, a claim accrues under the “discovery rule” only when a plaintiff discovers or should have discovered the infringement – a standard that potentially allows plaintiffs to recover for decades-old copyright violations, even where there has been no fraud or concealment by the defendant. Although strong arguments support the finality and certainty that the injury rule provides, every appeals court that has considered this long-debated question has held that the discovery rule applies in copyright cases.

In 2020, however, the U.S. Court of Appeals for the Second Circuit defanged the discovery rule. In [Sohm v. Scholastic](#), the Second Circuit held that, even though the discovery rule applies and authorizes *liability* for infringements that arise more than three years before a lawsuit is commenced, a plaintiff is nevertheless precluded from recovering *damages* going back more than three years from the filing of suit. In other words, under *Sohm*, a plaintiff could be vindicated at trial for an infringement that is more than three years old, but in virtually all cases could not receive monetary compensation for *damages* that were more than three

years old. (Under both the discovery and injury rules, a plaintiff can always recover damages for infringements that occur in the three years before filing suit, even if the original infringement happened before that three-year window.)

The Eleventh and Ninth circuits rejected the Second Circuit's analysis, holding that the Copyright Act places no such time limitation on damages, and the Supreme Court granted review (via certiorari) to resolve the circuit split. (See [Nealy v. Warner Chappell Music; Starz Ent., LLC v. MGM Domestic TV Distribution, LLC](#)) Although the dispute concerned available damages under the discovery rule, copyright lawyers eagerly awaited the decision, anticipating that the court would take the opportunity to decide once and for all whether the discovery rule or the injury rule applies under the Copyright Act. The Supreme Court declined to do so.

### Supreme Court Weighs in on Copyright Infringement Damages

In *Warner Chappell Music, Inc. v. Nealy*, a 6-3 opinion, the Supreme Court held earlier this month that there is no time-based limitation on damages in copyright infringement actions. The case arose from a music venture between Sherman Nealy and Tony Butler, who formed Music Specialist, Inc. in 1983. After the venture dissolved, Nealy spent a number of years in prison and, without his knowledge, Butler entered into an agreement with Warner Chappell Music to license works from the Music Specialist catalog. One Music Specialist composition was interpolated into a 2008 hit song by Flo Rida that was then licensed for use on popular television shows, while other works appeared in recordings by the Black Eyed Peas and Kid Sister.

Following Nealy's release from prison in 2018, he claimed to be the sole owner of certain Music Specialist works, and he sued Warner Chappell for copyright infringement arising from acts relating to those works, dating back to 2008. Nealy sought damages and disgorgement of profits for the 10-year period of alleged infringement. Relying on the Second Circuit's decision in *Sohm*, the District Court held that, even if Nealy discovered the infringements only after his release from prison and his claims were therefore timely under the discovery rule, he could nevertheless only obtain monetary relief for the three years prior to filing suit. The Eleventh Circuit reversed, following the Ninth Circuit's approach and rejecting the three-year damages bar on timely claims.

The Supreme Court affirmed the Eleventh Circuit's decision and held that the text of the Copyright Act does not support the existence of a separate damages bar for an otherwise timely copyright claim. The *Warner* decision, therefore, resolves the circuit split and clarifies that under the discovery rule, a copyright plaintiff can, in fact, recover damages for infringements dating back many years without an artificial three-year limit on damages. Notably, however, the majority sidestepped the more fundamental question of whether the discovery rule should apply at all in copyright cases.

In dissent, Justice Neil Gorsuch opined that the injury rule – where limitations periods begin to run when the plaintiff can file suit and obtain relief – is the standard rule for interpreting statutes. Accordingly, he criticized the majority for describing how the discovery rule should operate under the Copyright Act when, in his view, the Act “almost certainly does not tolerate a discovery rule.” But at least for now, the Copyright Act *does* tolerate the discovery rule, and final resolution of whether the discovery rule or the injury rule should govern the timeliness of claims filed under the Copyright Act will be resolved only by a future case.

### The Takeaway: No Time-Based Limitations on Copyright Infringement Damages

Most circuits have adopted the discovery rule, which exposes copyright defendants to substantial and potentially open-ended exposure for old and stale infringement claims. For a short time, the *Sohm* decision greatly diminished the discovery rule by placing a time-based limit on monetary relief. Now that *Sohm* has been overturned, the discovery rule is in full force. Unless and until the Supreme Court rejects or limits the discovery rule, potential copyright defendants should be reminded that, notwithstanding the Copyright Act’s three-year statute of limitations, they may face broad open-ended exposure to infringement claims brought well after that three-year cutoff – and monetary damages arising from those belated claims – regardless of whether their alleged infringements occurred three years ago, five years ago or 25 years ago.

---

### For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

#### Guy Cohen

##### Partner

212 468 4853

[gcohen@dglaw.com](mailto:gcohen@dglaw.com)

#### Danielle Zolot

##### Associate

212 237 1462

[dzolot@dglaw.com](mailto:dzolot@dglaw.com)