

MEMORANDUM

To: Peter Rock Ternes
From: [Your Name]
Date: [Date of Submission]
Re: [Comment Topic]

I. Introduction

The Copyright Act of 1976, Pub L 94-553, 90 Stat 2541 (1976), codified at 17 USC § 101 et seq (2000), provides the copyright owner with “an exclusive right under a copyright . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 USC § 501(b).

This right to institute a court proceeding to vindicate one’s exclusive rights to the copyrighted work is tempered by the statute of limitations set forth in the statute. The Act holds that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 USC § 507(b). The statute of limitations provided in the Act does not seem to define when a claim has “accrued” but courts generally define it as when “one has knowledge of a violation or is chargeable with such knowledge.” Lyons Partnership, LP v Morris Costumes, Inc, 243 F3d 789, 796 (4th Cir 2001), quoting Hotaling v Church of Jesus Christ of Latter-Day Saints, 118 F3d 199, 202 (4th Cir 1997). See also Roley v New World Pictures, Ltd, 19 F3d 479, 481 (9th Cir 1994). The Seventh Circuit noted that “the copyright statute of limitations starts to run when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights.” Gaiman v McFarlane, 360 F3d 644, 653 (7th Cir 2004).

Even though all this seems perfectly clear, some courts have thrown a wrench into the analysis by shortening the length of time allowed a plaintiff in bringing his claim by allowing a defendant to plead the defense of laches. The doctrine of laches is based on the maxim that equity aids the vigilant, not those who sleep on their rights. Lyons, 243 F3d at 797–98. See also Ivani Contracting Corp v City of New York, 103 F3d 257, 259 (2d Cir 1997). Laches may be applied by a court to bar a suit in equity that has been brought so long after the cause of action accrued that the court finds that bringing the action is unjust. Ivani, 103 F3d at 259.

The circuits are split, however, on the availability of the defense of laches against a claim of copyright infringement. The Fourth Circuit has definitively barred the use of laches as a defense to copyright infringement claims in deference to Congress’s explicit creation of a statute of limitations in the Copyright Act. Lyons, 243 F3d at 798. The Ninth Circuit has taken an expansive view by showing little need for deference. Danjaq LLC v Sony Corp, 263 F3d 942, 963 (9th Cir 2001). The Sixth, Seventh, and Tenth Circuits have carved out various middle grounds to show some deference but allow the defense in unusual circumstances. Chirco v Crosswinds Communities, Inc, 474 F3d 227, 232–33 (6th Cir 2007); Teamsters & Employers Welfare Trust of Illinois v Gorman Brothers Ready Mix, 283 F3d 877, 881 (7th Cir 2002); Jacobsen v Deseret Book Co, 287 F3d 936, 950 (10th Cir 2002).

Because this topic presents a circuit split whose resolution could have profound implications on a plaintiff’s ability to collect large amounts of damages for supposed copyright infringement, an interesting analysis pointing to a resolution would be welcome. Additionally,

because very little has been written on the matter and because the topic presents several extremely interesting lines of analyses, it should be further pursued.

II. Analysis of Current Law

To successfully assert a laches defense, a defendant must demonstrate that the plaintiff remained silent after learning that his legal rights had been violated and such delay by the plaintiff caused prejudice to the defendant. See Danjaq, 263 F3d at 951. See also Couveau v American Airlines, Inc., 218 F3d 1078, 1083 (9th Cir 2000) (“To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.”). Courts often divide the delay prong into two separate inquiries: 1) whether there was a delay; and 2) whether the delay was unreasonable. See Danjaq, 263 F3d at 952. See also Melville B. Nimmer and David Nimmer, 3 Nimmer on Copyright § 12.06 (2004).

Whether the plaintiff has delayed in filing his claim depends on when the “clock” began to run. See Danjaq, 263 F3d at 952. Unlike the statute of limitations, which precludes claims filed three years after the infringement occurs, the clock begins to run for purposes of laches when the plaintiff knew or should have known about the claim. Kling v Hallmark Cards, Inc., 225 F3d 1030, 1036 (9th Cir 2000). Accordingly, if a plaintiff could not have known about a claim until after the statutory period, the claim may be barred by the statute of limitations but permitted by laches. Holmberg v Armbrecht, 327 US 392, 396 (1946). Conversely, a plaintiff may be barred by laches but not by the statute of limitations if he was aware of, or should have been aware of, an impending infringement. Kling, 225 F3d at 1038. The Court has explained that this discrepancy between laches and the statute of limitations by noting that “[e]quity eschews mechanical rules; it depends on flexibility. Equity has acted on the principal that ‘laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced.’” Holmberg, 327 US at 396, quoting Gallier v Cadwell, 145 US 368, 373 (1891). See also S. Pac. Co v Bogert, 250 US 483, 488–89 (1919).

Whether a particular delay is reasonable depends on its cause. Danjaq, 263 F3d at 954. Courts have determined, for example, that a delay was reasonable where it was necessary to exhaust administrative remedies, evaluate and prepare a complicated claim, or determine whether the cost of litigation was justified by the infringement. *Id.* On the other hand, delay is unreasonable if its “purpose is to capitalize on the value of the alleged infringer’s labor, by determining whether the infringing conduct will be profitable.” *Id.* On the virtues of applying the doctrine of laches in copyright cases, Judge Learned Hand famously explained in one of the most cited copyright passages:

“[i]t must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.”

Haas v Leo Feist, Inc., 234 F 105, 108 (SDNY 1916). Unreasonable delay is not enough to preclude a claim on the basis of laches; the defendant also must have been prejudiced by the delay. Courts have recognized two chief forms of prejudice in the laches context—evidentiary and expectations-based. Danjaq, 263 F3d at 955. Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died. *Id.*

citing Jackson v Axton, 25 F3d 884, 889–90 (9th Cir 1994). See also Trustees for Alaska Laborers-Construction Industry Health & Security Fund v Ferrell, 812 F2d 512, 518 (9th Cir 1987); Lotus Development Corp v Borland Internation, Inc, 831 F Supp 202, 220 (D Mass 1993). Under the theory of expectations-based prejudice, a defendant may demonstrate prejudice by showing that he took actions or suffered consequences that he would not have, had the plaintiff brought suit promptly. Danjaq, 263 F3d at 955, citing Jackson, 25 F3d at 889; Russell v Price, 612 F2d 1123, 1126 (9th Cir 1979); Lotus, 831 F Supp at 220 (noting that one form of prejudice is “continuing investments and outlays by the alleged infringer in connection with the operation of its business”).

Even if the defendant successfully pleads all aspects of the laches defense, the plaintiff can still avoid a dismissal of the claim by arguing that the defendant willfully infringed on the copyright. Various courts have held that laches does not bar a suit against a deliberate infringer based on the equitable maxim that “he who comes into equity must come with clean hands.” Hermes International v Lederer de Paris Fifth Ave, Inc, 219 F3d 104, 107 (2d Cir 2000), quoting Precision Instrument Mfg Co v Automotive Maintenance Machinery Co, 324 US 806, 814 (1945).

Several courts have applied this “piracy” exception to laches, chiefly the Second Circuit, see, for example, Hermes, 219 F3d at 107; Nihon Keizai Shimbun, Inc v Comline Business Data, Inc, 166 F3d 65, 75 (2d Cir 1999), and the Northern District of Illinois, see, for example, Harmony Gold U.S.A., Inc v FASA Corp, 40 USPQ2d 1057, 1060 (ND Ill 1996); American Airlines, Inc v A 1-800-A-M-E-R-I-C-A-N Corp, 622 F Supp 673, 685 (ND Ill 1985), and it has been recognized in the various copyright treatises. See, for example, Melville B. Nimmer and David Nimmer, 3 Nimmer on Copyright § 12.06, at 12-125 (2000) (“Moreover, delay in pursuing a claim may not be a bar against one who knew of plaintiff’s asserted rights, or as against a deliberate infringer.”).

Thus, for purposes of the willfulness exception to laches, the term “willful” refers to conduct that occurs “with knowledge that the defendant’s conduct constitutes copyright infringement.” Danjaq, 263 F3d at 957, citing Columbia Pictures Television v Krypton Broadcasting of Birmingham, Inc, 106 F3d 284, 293 (9th Cir 1997), revd on other grounds sub nom. Feltner v Columbia Pictures Television, 523 US 340 (1998).

With these principles in mind, the Ninth Circuit in Danjaq barred the defendant McClory’s counterclaims of copyright infringement by upholding the plaintiff’s assertion of the defense of laches. Danjaq, 263 F3d at 963. The case concerned the rights to the screenplay and film version of the James Bond character. *Id.* at 947. For most of the movies in contention, the court noted that from the time the films were released (between 1962 and 1977) until McClory filed his counterclaim in this suit (1998), McClory took no legal action to stop, or to seek redress for, the alleged infringements. *Id.* at 952. Thus, for these seven movies, the period of delay ranged from thirty-six years to nineteen years. *Id.* The court held, “By any metric, this delay is more than enough.” *Id.* Interestingly, the court also barred a counterclaim relating to the re-release in 1997 of Bond movies on DVD, even though the claim was filed only a year later. *Id.* at 953. The court held, “It would be incongruous indeed to hold the opposite—to say, that is, that McClory’s claim for infringement on a re-release survives, despite the dismissal for laches of the same claim regarding the original work.” *Id.* See also Hot Wax, Inc v Turtle Wax, Inc, 191 F3d 813, 821–22 (7th Cir 1999) (rejecting the argument that each new instance of trademark infringement must start the clock anew on laches: “Without the availability of the application of

laches to a claim arising from a continuing wrong, a party could, theoretically, delay filing suit indefinitely.”).

Because McClory had presented no sufficient justification for his delay, the court also held that the delay was unreasonable. Danjaq, 263 F3d at 954. Finally, on the element of prejudice, the court held that “the district court properly concluded that Danjaq established both [evidentiary and expectations-based] forms of prejudice.” Id at 955. The court noted that many relevant records had gone missing and relevant witnesses had deceased during the delay period. Id at 955–56. There was also expectations-based—or economic—prejudice. Danjaq presented uncontested evidence that it invested approximately one billion dollars in the development, production, marketing, and distribution of the James Bond movies. Id at 956. The court held that “it would be inequitable to permit McClory to wait forty years, then to profit from the risk inherent in Danjaq’s investment in the franchise.” Id. Finally, the court recognized the willful infringement exception to the defense of laches but held that as a matter of law McClory could not demonstrate deliberate infringement. Id at 958.

As opposed to the Ninth Circuit’s holding, the Fourth Circuit, in Lyons held that laches never can bar a statutorily timely claim. Lyons, 243 F3d at 798. The plaintiff in Lyons owned the copyright to Barney (the purple dinosaur) and sought, through its claim for injunctive relief and damages, to prevent the defendant from marketing look-alike costumes of the “well-stuffed Tyrannosaurus.” Id at 794–95. The district court found that the defendant had infringed the plaintiff’s copyright in Barney; however, it held that even though some infringement occurred within the limitations period all of the claims were barred by the statute of limitations and laches because the plaintiff knew of the infringements more than four years before bringing suit. Id at 796–97. The Fourth Circuit disagreed and held that, where there is an express statute of limitations, the separation of powers would be offended if laches, a judicially-created timeliness rule, barred claims brought within the statutory period. Id at 797.

The Lyons court rejected wholesale the idea that laches can bar a timely copyright infringement claim. Id at 798. The court stated that “when Congress creates a cause of action and provides both legal and equitable remedies, its statute of limitations for that cause of action should govern, regardless of the remedy sought.” Id. Because laches is a judicially created doctrine, whereas statutes of limitations are legislative enactments, it has been observed that “[i]n deference to the doctrine of separation of powers, the [Supreme] Court has been circumspect in adopting principles of equity in the context of enforcing federal statutes.” Id, citing Oneida County NY v Oneida Indian Nation of New York State, 470 US 226, 262 n 12 (Stevens dissenting in part) (relying generally on Weinberger v Romero-Barcelo, 456 US 305 (1982)). Therefore, under Lyons, laches never is available as a defense to preclude timely infringement claims—equitable or legal—because Congress has created an express statute of limitations. Lyons, 243 F3d at 798.

The Tenth Circuit, in Jacobsen, refused to reject wholesale the use of laches as a defense to copyright infringement actions, but did state that “[r]ather than deciding copyright cases on the issue of laches, courts should generally defer to the three-year statute of limitations, 17 USC § 507(b), provided by the Copyright Act.” Jacobsen, 287 F3d at 950. The court noted the arguments made in Lyons regarding separation of powers but still held that “it is possible, in rare cases, that a statute of limitations can be cut short by the doctrine of laches.” Id.

In Chirco the Sixth Circuit similarly held that “[we have] carved out a middle ground between the Fourth Circuit’s strict prohibition on application of the laches doctrine in cases involving a statute with an explicit limitations provision and the somewhat more expansive

application of the doctrine by the Ninth Circuit.” Chirco, 474 F3d at 232–33. Citing similar concerns as the court in Jacobsen regarding separation of powers and deference to Congress, the court also noted that “[s]everal reasons underlie the use of the statutory period as the laches period. It enhances the stability and clarity of the law by applying neutral rules and principles in an evenhanded fashion rather than making the question purely discretionary. It enhances the rationality and objectivity of the process.” *Id.* Even so, the court went on to adopt the holding of the Seventh Circuit and concluded that “a flat proscription such as that invoked by the Fourth Circuit against the defense of laches in cases involving a federal statutory claim is both unnecessary and unwise.” *Id.* at 233–34. Indeed, laches can be argued “regardless of whether the suit is at law or in equity, because, as with many equitable defenses, the defense of laches is equally available in suits at law.” Jacobsen, 287 F3d at 234, citing Gorman Brothers, 283 F3d at 881. In conclusion the court held that “the equitable doctrine of laches can, therefore, be applied in copyright cases in this circuit in what can best be described as unusual circumstances.” Chirco, 474 F3d at 234.

III. Existing Commentary

An article by Harrell wonderfully lays out the legislative history and purpose of the statute of limitations on civil actions as provided in 17 USC § 507(b). See David E. Harrell, Comment, Difficulty Counting Backwards from Three: Conflicting Interpretations of the Statute of Limitations on Civil Copyright Infringement, 48 SMU L Rev 669 (1995). It may be helpful to the Commentator in his analysis but certainly does not preempt this topic.

Another article contains an extremely thorough treatment of the issue of laches as a defense to copyright infringement claims but is simply an outline of the issues. See Annotation, Laches or Undue Delay as Defense to Action Based on Copyright, 148 ALR Fed 413 (1998).

There are two articles which are closely on-point but neither of which preempts this Comment in any way. The first is a rambling piece that is frankly very poorly written. Don E. Tomlinson, Federal Versus State Jurisdiction and Limitations Versus Laches in Songwriting Disputes: The Split Among the Federal Circuits in Let the Good Times Roll, Why Do Fools Fall in Love?, and Joy to the World, 23 Loyola LA Ent L Rev 55. The author does discuss the circuit split regarding the defense of laches in copyright infringement claims but fails to offer any solutions other than a call to the Supreme Court to resolve the issue. *Id.* at 74–77.

The second article, by Ruga, directly discusses the circuit split on this precise issue. Dylan Ruga, The Role of Laches in Closing the Door on Copyright Infringement Claims, 29 Nova L Rev 663 (2005). The article argues that laches should only be applied to claims for equitable remedies, and then categorizes remedies available under the Copyright Act as either legal or equitable under the Supreme Court’s analysis in Chauffeurs, Teamsters & Helpers Local No. 391 v Terry, 494 US 558 (1989). This solution is insufficient for several reasons. First, as noted above, some courts have distinctly held that laches is available as a defense at law and at equity or unavailable either at law or at equity. Second, the federal courts have attempted to rid the legal system of the antiquated notion of suits at law versus suits at equity. See Lyons, 243 F3d at 798 (“And the fact that Federal Rules of Civil Procedure 1 and 2 merged law and equity for procedural purposes—Rule 2, for example, provides that “[t]here shall be one form of action to be known as “civil action”—does not alter the substantive rights inherent in law and equity.”). Third, the split argued in the article would split the litigation in which plaintiffs are asking for mixed legal and equitable relief, creating further headaches for courts already

struggling to uniformly apply laches in the copyright context. Finally, as will be noted below, there are far more interesting approaches to the issue and to a possible resolution than simply making a laundry list of actions at law and at equity.

IV. Evaluation of the Topic as the Basis of a Comment

A. Preemption

The cases noted above which have created the circuit splits are all relatively older and the Supreme Court has not decided any of those issues. Additionally, the Supreme Court recently denied certiorari without comment to resolve this split in Crosswinds Communities, Inc v Chirco, 127 S Ct 2975 (Mem) (2007).

B. Discussion of the Topic

The courts have already laid out various policy reasons for allowing or forbidding the use of laches as a defense to copyright infringement claims such that an evaluation of these reasons may be a good place to start. As noted above, the court in Chirco laid out a few reasons for barring the use of laches to shorten the statute of limitations on a copyright infringement claim: objectivity, rationality, and applying neutral rules in an evenhanded fashion rather than on a purely discretionary basis. Chirco, 474 F3d at 232–33. To those concerns one could also add the advantage of predictability provided to both parties when rules rather than discretionary views are applied. Of course, these issues implicate the age-old discussion between rules and standards that has been carried out in countless legal literature. The Commentator could take some of those analyses and apply them here. They also implicate issues of justice about the extent to which courts are consistent in their application of their discretionary power in barring a claim through laches. An interesting approach would be to perform an empirical analysis of the application of the laches doctrine by different courts in various cases to gauge the consistency in the application. If the results show that the courts apply the doctrine in highly varied ways, then the court's concerns in Chirco would be more damning. It would show that either the courts are not objective or that the rules are not neutral but in any case either result could result in forum shopping. On the other hand, if the results show that courts are fairly consistent, then the Chirco court's concerns could be discounted and may provide an additional basis to allow some discretion to the courts in barring certain claims.

Other courts in favor of allowing the defense of laches have cited the concern that a plaintiff should not be allowed to wait for a defendant to expend large resources in utilizing the copyright and then bring a suit to recover all the profits. While courts have stated such a concern in simple, justice-based rhetoric, an economic analysis by the Commentator could prove fruitful here. How would allowing or forbidding the defense of laches vary the incentive structures for plaintiffs and defendants? Presumably, forbidding the defense of laches would encourage the plaintiff to wait to file suit but would also discourage the defendant from exploiting the copyright. In some sense, this would strongly serve the function of copyright law in deterring infringing activity by the defendant but could also lead to economic losses if the defendant was in the best position to fully exploit such dormant copyrights. On the other hand, allowing the defense of laches incentivizes a defendant party to exploit another's copyright.

The thorn in this analysis, of course, is that courts have recognized an exception to the defense of laches—namely that a defendant who has willfully infringed cannot plead the defense because courts of equity require a defendant to come with clean hands. Therefore, even if courts allowed the defense of laches so as to create incentives for a defendant to expend resources to exploit a dormant copyright, he would be unable to do so because of a lack of defense to a probable future copyright infringement claim. That could lead to an economic loss. There are many other interesting incentive effects to consider, including the ruling noted above by the Ninth Circuit that possibly allows a defendant to plead laches to present or future infringement actions, e.g., for re-release of DVDs based on older copyrights. In any case, as is obvious, there are many interesting analyses to consider.

Of course, even beyond the economic incentives-based approach, the Commentator could approach the issue from a constitutional perspective and analyze the effectiveness of the separation of powers argument offered by several courts. The Commentator could also analyze and apply the legislative history and purpose of the statute of limitations set forth in 17 USC § 507(b) to assess the importance of limiting the laches defense. Finally, as was noted in the TP on this topic, the Comment could address Judge Posner’s contention in Gorman Brothers that laches is symmetrical to and can be analogize to equitable estoppel and other tolling doctrines that extend the statute of limitations. That is a contention worth exploring.

V. Annotated Bibliography

Cases

Lyons Partnership, LP v Morris Costumes, Inc., 243 F3d 789 (4th Cir 2001) (holding that a defendant can never plead a defense of laches given a statutory-defined statute of limitations in the Copyright Act)

Hotaling v Church of Jesus Christ of Latter-Day Saints, 118 F3d 199 (4th Cir 1997) (defining “accrual” in the Copyright Act as when “one has knowledge of a violation or is chargeable with such knowledge”)

Roley v New World Pictures, Ltd., 19 F3d 479 (9th Cir 1994) (defining “accrual” in the Copyright Act as when “one has knowledge of a violation or is chargeable with such knowledge”)

Gaiman v McFarlane, 360 F3d 644 (7th Cir 2004) (“[T]he copyright statute of limitations starts to run when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights.”)

Ivani Contracting Corp v City of New York, 103 F3d 257 (2d Cir 1997) (holding that the doctrine of laches is based on the maxim *vigilantibus non dormientibus aequitas subvenit* or that equity aids the vigilant, not those who sleep on their rights)

Danjaq LLC v Sony Corp., 263 F3d 942 (9th Cir 2001) (taking an expansive view of the laches doctrine by showing little need for deference to the congressionally created statute of limitations)

Jacobsen v Deseret Book Co, 287 F3d 936 (10th Cir 2002) (holding that defense of laches is only allowed in unusual circumstances in copyright claims)

Chirco v Crosswinds Communities, Inc, 474 F3d 227 (6th Cir 2007) (holding that defense of laches is only allowed in unusual circumstances in copyright claims)

Teamsters & Employers Welfare Trust of Illinois v Gorman Brothers Ready Mix, 283 F3d 877 (7th Cir 2002) (holding that laches can be argued regardless of whether the suit is at law or in equity, because, as with many equitable defenses, the defense of laches is equally available in suits at law)

Couveau v American Airlines, Inc, 218 F3d 1078 (9th Cir 2000) (holding that “[t]o establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself”)

Kling v Hallmark Cards, Inc, 225 F3d 1030 (9th Cir 2000) (holding that the clock begins to run for purposes of laches when the plaintiff knew or should have known about the claim)

Holmberg v Armbrecht, 327 US 392 (1946) (noting that equity depends on flexibility in explaining discrepancy between laches and the statute of limitations)

Galliher v Cadwell, 145 US 368 (1891) (noting that equity depends on flexibility)

S. Pac. Co v Bogert, 250 US 483 (1919) (noting that equity depends on flexibility in explaining discrepancy between laches and the statute of limitations)

Haas v Leo Feist, Inc, 234 F 105 (SDNY 1916) (defending laches as a defense in copyright claims by noting the injustice of allowing a plaintiff to profit from a defendant’s enterprise)

Jackson v Axton, 25 F3d 884, 889–90 (9th Cir 1994) (defining evidentiary prejudice in the context of laches)

Trustees for Alaska Laborers-Construction Industry Health & Security Fund v Ferrell, 812 F2d 512 (9th Cir 1987) (defining evidentiary prejudice in the context of laches)

Lotus Development Corp v Borland Internation, Inc, 831 F Supp 202 (D Mass 1993) (noting that one form of prejudice is “continuing investments and outlays by the alleged infringer in connection with the operation of its business”)

Russell v Price, 612 F2d 1123, 1126 (9th Cir 1979) (upholding finding of expectations-based prejudice in the context of laches)

Hermes International v Lederer de Paris Fifth Ave., Inc, 219 F3d 104, 107 (2d Cir 2000) (holding that he who comes into equity must come with clean hands)

Precision Instrument Mfg Co v Automotive Maintenance Machinery Co, 324 US 806, 814 (1945) (holding that he who comes into equity must come with clean hands)

Nihon Keizai Shimbun, Inc v Comline Business Data, Inc, 166 F3d 65, 75 (2d Cir 1999) (forbidding defense of laches in case of willful infringement)

Harmony Gold U.S.A., Inc v FASA Corp, 40 USPQ2d 1057, 1060 (ND Ill 1996) (forbidding defense of laches in case of willful infringement)

American Airlines, Inc v A 1-800-A-M-E-R-I-C-A-N Corp, 622 F Supp 673, 685 (ND Ill 1985) (forbidding defense of laches in case of willful infringement)

Columbia Pictures Television v Krypton Broadcasting of Birmingham, Inc, 106 F3d 284, 293 (9th Cir 1997), *revid* on other grounds sub nom. Feltner v Columbia Pictures Television, 523 US 340 (1998) (defining willful infringement as conduct that occurs “with knowledge that the defendant's conduct constitutes copyright infringement”)

Hot Wax, Inc v Turtle Wax, Inc, 191 F3d 813, 821–22 (7th Cir 1999) (rejecting the argument that each new instance of trademark infringement must start the clock anew on laches: “Without the availability of the application of laches to a claim arising from a continuing wrong, a party could, theoretically, delay filing suit indefinitely.”)

Oneida County N.Y. v Oneida Indian Nation of New York State, 470 US 226, 262 n 12 (Stevens dissenting in part) (refusing to adopt principles of equity in deference to separation of powers)

Weinberger v Romero-Barcelo, 456 US 305 (1982) (refusing to adopt principles of equity in deference to separation of powers)

Chauffeurs, Teamsters & Helpers Local No. 391 v Terry, 494 US 558 (1989) (discussing how to classify remedies as at law or at equity)

Commentary

David E. Harrell, Comment, Difficulty Counting Backwards from Three: Conflicting Interpretations of the Statute of Limitations on Civil Copyright Infringement, 48 SMU L Rev 669 (1995) (laying out the legislative history and purpose of the statute of limitations on civil actions in copyright claims)

Annotation, Laches or Undue Delay as Defense to Action Based on Copyright, 148 ALR Fed 413 (1998) (outlining the issue of laches as a defense to copyright infringement claims)

Don E. Tomlinson, Federal Versus State Jurisdiction and Limitations Versus Laches in Songwriting Disputes: The Split Among the Federal Circuits in Let the Good Times Roll, Why Do Fools Fall in Love?, and Joy to the World, 23 Loyola LA Ent L Rev 55 (arguing the the Supreme Court should resolve the circuit split in allowing laches as a defense)

Dylan Ruga, The Role of Laches in Closing the Door on Copyright Infringement Claims, 29 Nova L Rev 663 (2005) (arguing that courts should allow laches as a defense for equitable claims and not legal claims)

Melville B. Nimmer and David Nimmer, 3 Nimmer on Copyright § 12.06 (2004)

Statutes

17 USC § 101 et seq (2000)