

Authorship and Time

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How much time does someone have to assert authorship of a copyrighted work? This question simmers uneasily beneath the surface of supposedly settled law. How we answer it is foundational not just for our system of copyright but for our entire civil justice system, as it shines a vital light on the tension between fairness and efficiency within.

Thus far, courts have largely interpreted the U.S. Copyright Act to bar an assertion of authorship if not made within three years from notice of someone else repudiating it. So, for example, if two people collaborate on a song and one thereafter insists she wrote it by herself, the other has three years to assert otherwise. This is essentially a one-shot approach: sue now or forever abandon one's authorship and the rights that come with it. But the Supreme Court has allowed claims of copyright infringement to be brought within three years after notice of any infringing act, even if that act was by someone who had first infringed the copyright many years earlier. This allows for many potential shots: sue any time that an infringing act makes a lawsuit "worth the candle," as it was pithily put by Justice Ginsburg in *Petrella v. MGM*.

This Article argues, first, that this distinction is illusory: *Petrella's* rationale should apply as well to assertions of authorship. And second, state law may hold the true key, given that authorship is likely not a "claim" under the Copyright Act. But beyond these arguments, this Article explores the deeper tensions at play: if courts begin to allow later assertions of authorship, this will increase their workload while testing their ability to navigate faded memories, lost documents, and dead authors' estates. Further, for every meritorious but belated assertion of authorship that is validated, there will likely be an equal or greater number of weak suits looking for easy settlements. So, in considering the fraught relationship between authorship and time, this Article will help policymakers strike the best possible balance between systemic efficiency and authorial justice.

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