

## LITIGATING COMPUTER COPYRIGHT CLAIMS (PART II)

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This article is a continuation of one published in the first issue of the Birmingham Bar Bulletin for 2002, which focused primarily upon making the plaintiff's case. This article focuses upon the damages that a successful plaintiff may obtain, whether and when injunctive relief or impoundment is available, and details common copyright defenses, including license and the statute of limitations.

### DAMAGES

The Copyright Act allows a copyright owner to recover his actual damages **and** "any additional profits of the infringer that are attributable to the infringement." 17 U.S.C. § 504(b) (emphasis added). Often the parties disagree about the "actual damages," including such issues as (1) whether the copyright owner should be entitled to a lower contractual royalty amount or a higher list price, or (2) whether the plaintiff lost a larger market as a consequence of the infringement.<sup>1</sup>

A burden shifting analysis is applied in determining the "profits of the infringer." The plaintiff bears the initial burden of demonstrating the gross revenues received by the infringer for the use of the copyrighted material. See *id.* Once the plaintiff has shown the gross revenue received by the infringer, the statute places the burden upon the defendant to show any "deductible expenses and the elements of profit attributable to factors other than the copyrighted work." *Id.* The word "profit" is not defined in the Act; however, the word has been assigned its normal meaning: "the excess of return over expenditures realized from the conduct of a business." See *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 563 (2d Cir. 1994) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir. 1981)), *opinion amended and superceded on other grounds*, No. 87

CIV. 8397 1996 WL 4122 (S.D.N.Y. Jan. 3, 1996). To meet this burden, the infringer must prove “(1) ... that each category of overhead contributed to the production of the infringing items, and (2) [offer] a fair and acceptable formula for allocating a given portion of overhead to those items.” *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 832-33 (S.D.N.Y. 1991) (citations omitted).

Further, an infringer who commingles infringing and non-infringing elements (such as selling a package of several software programs for one price) “must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him.” *Harper & Row Publ., Inc. v. Nation Enter.*, 471 U.S. 539, 567 (1985) (quoting *Shelden v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940)).

Similarly, once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the alleged infringer to show that this damage would have occurred had there been no taking of the copyrighted expression. *See Harper & Row Publ.*, 471 U.S. at 567.

Recovery of statutory damages and attorney fees are also allowed, but in more narrow circumstances. Section 504(c) provides for an award of statutory damages for all infringement for one “work” in a sum of not less than \$750 or more than \$30,000. *See* 17 U.S.C. § 504(c)(1). In a case where the plaintiff proves that the defendant wilfully infringed the plaintiff’s copyright, the court may award a sum of not more than \$150,000. *See* 17 U.S.C. § 504(c)(2).

However neither statutory damages nor attorney fees are allowed for infringement<sup>2</sup> (1) of unregistered, “unpublished” works<sup>3</sup> or (2) of unregistered, published works (unless registration is made within three months of the first publication). See 17 U.S.C. § 412 (1994). “Publication” is defined in the Copyright Act as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 101 (1994). In addition to the statute, several circuits have held that a copyright owner is not entitled to statutory damages or attorney fees when the alleged infringement occurred before the work was copyrighted.<sup>4</sup>

Finally, a prevailing plaintiff can recover costs under Section 505, at the judge’s discretion.<sup>5</sup> Under the Copyright Act, “the plaintiff may be considered the prevailing party if they succeed on any significant issue in litigation which achieves some of the benefit sought in bringing the suit.”<sup>6</sup> Success on a “purely technical or de minimis” claim does not qualify a litigant as a prevailing party.<sup>7</sup> A plaintiff need only prevail on the merits and need not receive a substantial monetary award to be awarded costs.<sup>8</sup>

### **INJUNCTIVE RELIEF AND IMPOUNDMENT**

The standard for granting a preliminary injunction in a copyright case varies by circuit. Some Circuits require that a plaintiff demonstrate all four of the normal injunctive elements,<sup>9</sup> while others apply a less strict, hybrid test.<sup>10</sup> The Eleventh Circuit has not yet articulated the standard but applied without discussion the normal four requirements in *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (finding a plaintiff must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury to the plaintiffs outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest).

Despite the variance of tests, a majority of courts agree that a showing of likelihood of success on the merits raises a presumption of irreparable harm.<sup>11</sup> Although the Eleventh Circuit has not yet addressed the issue, at least one district court in the Eleventh Circuit has held that a plaintiff “need only show that there is a likelihood of success on the merits, and need not show irreparable harm” in order for a preliminary injunction to issue. *Sony Music Enter., Inc. v. Global Arts Produc.*, 45 F. Supp. 2d 1345, 1347 (S.D. Fla. 1999).

A similar remedy to an injunction is impoundment. Title 17 Section 503 provides “[a]t any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner’s exclusive rights . . .” 17 U.S.C. § 503(a) (1994). In order to be granted an impoundment, a plaintiff must meet the requirements for permanent or preliminary injunctive relief. See *WPOW, Inc. v. MRLJ Enter.*, 584 F. Supp. 132, 135 (D. D.C. 1984). Congress wrote Section 503 in permissive language; therefore, a district court may decline to impound infringing works. See, e.g., *Midway Mfg. v. Omni Video Games, Inc.*, 668 F.2d 70, 72 (1st Cir. 1981); *Paramount Pictures v. Jane Doe*, 821 F. Supp. 82, 85-86 (E.D.N.Y. 1993).

### **CONTRACT VS. LICENSE**

A common fight in copyright litigation arises when a licensee has violated his or her license. Obviously, there is a potential breach of contract claim, but may the plaintiff also bring a copyright infringement claim even though the defendant has a license?

Often courts find that where a licensee has exceeded the “scope” of the license, the plaintiff may maintain a copyright claim.<sup>12</sup> For instance, in *CBS v. Primetime Joint Venture*, 76 Supp. 2d 1333, 1334 (S.D. Fla. 1998), the defendant was granted a limited

license to service “unserved households.” Allegedly, Primetime provided services to other households in violation of the license agreement, and CBS filed suit alleging, *inter alia*, a copyright violation. Primetime moved for summary judgment on the copyright claim, arguing that this was simply a contract dispute. The trial court denied the motion and, instead, determined that CBS’s allegations (if true) would exceed the “scope” of the license and thus be an actionable copyright claim.

Likewise, courts often hold that if the defendant has breached a “condition,” the plaintiff may maintain a copyright infringement claim, but if the defendant has breached a “covenant,” the plaintiff may only maintain a contract claim. See MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 10.15[A], at 10-120 (2000).<sup>13</sup> For instance, in *Fantastic Fakes, Inc. v. Pickwick International, Incorporated*, 661 F.2d 479, 484 (5th Cir. Unit B Nov. 1981), the license allowed the defendant to copy and distribute copyright songs and required it to affix a label on all recordings identifying Fantastic as the copyright owner. Instead of affixing Fantastic’s name to all of the recordings, Pickwick attached a label containing its name and the standard language prohibiting unauthorized reproduction of copyrighted material. The Fifth Circuit affirmed a summary judgment dismissing the copyright claims and held that the provision requiring a particular type of label was a covenant rather than a condition precedent to the license due to three controlling principles of state contract law: 1) promises in a contract should be construed as covenants rather than conditions; 2) terms of an agreement should be construed in order to avoid a forfeiture; and 3) all doubts regarding the meaning of the contract should be resolved against the drafter.<sup>14</sup>

In general, a plaintiff may only bring a copyright action when there has been a material breach of the licensing agreement *and* the plaintiff affirmatively acts to rescind the licensing agreement.<sup>15</sup> A breach will justify rescission of a licensing agreement only when it is “of so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s] to defeat the object of the parties . . . [The breach must constitute] a total failure in the performance of the contract.” NIMMER, 3 NIMMER ON COPYRIGHT § 10.15[A], at 116-18. Whether or not the failure to pay royalties is a material breach allowing for rescission is questionable.<sup>16</sup>

It appears that if both contract and copyright claims are allowed, courts will find the damages duplicative and award only the larger amount. For instance, in *MCA Television Limited v. Public Interest Corporation*, 171 F.3d 1265, 1275-76 (11th Cir. 1999), the Eleventh Circuit found that the award of both contract damages and copyright damages was a double recovery.<sup>17</sup> The court stated:

The Copyright Act is intended to protect copyright holders uncontested pirating by those unwilling to pay the full value of the works used. When copyright holders agree to license their products in exchange for a fee, however, they have entered the realm of legally enforceable contracts, and have represented as much to their contractual counterparts. Of course, copyright protections remain in the background to ensure that licensees do not use materials in ways that exceed the scope of their licenses. But where the use comports with that agreed upon by the parties, the mere fact that the contract is for copyrighted material does not allow copyright holders to escape the constraints of contract law.

*MCA Television Ltd.*, 171 F.3d at 1275-76.

### **STATUTE OF LIMITATIONS**

The statute of limitations for copyright actions is three years from the date of accrual. See 17 U.S.C. § 507(b) (1994). The majority rule is that a defendant is only liable for acts of infringement that occurred within three years prior to the suit.<sup>18</sup>

However, an important Eleventh Circuit case establishes that if there is a willful pattern of conduct, the plaintiff may be able to reach all acts of infringement rather than merely those within the statute of limitations. See *United States v. Shabazz*, 724 F.2d 1536, 1540 (11th Cir. 1984) (holding, in a criminal prosecution for operating a cassette bootlegging business, that the statute of limitation did not begin to run until the last act of infringement).<sup>19</sup>

The general rule is that a cause of action for copyright infringement accrues when one has knowledge of the violation or is chargeable with such knowledge. Although fraudulent concealment tolls the statute of limitations, the limitations period is only tolled as long as the fraud is effective.<sup>20</sup> In order to toll the statute of limitations, the plaintiff must prove two elements: that the defendant successfully concealed the cause of action and used fraudulent means to do so. Fraudulent concealment does not lessen a plaintiff's duty of diligence; it only acts as a measure of what a reasonable plaintiff would or could have known regarding the claim. However, once the plaintiff is on inquiry that they have a potential claim, the statute can start to run. Once the duty of inquiry arises, the plaintiff is charged with the knowledge that an inquiry would have revealed.<sup>21</sup>

## **CONCLUSION**

Copyright law provides powerful remedies to protect creative works, including computer software. This article hopefully has provided an overview of those remedies and some of the most common defenses that arise in copyright litigation.

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<sup>1</sup> See, e.g., *Softel, Inc. v. Dragon Medical*, 891 F. Supp. 935, 941 (S.D.N.Y. 1995) (holding that the plaintiff's damages were limited to the previously offered royalty payments rather than the list price), *aff'd*, 118 F.3d 955 (2d Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

<sup>2</sup> For purposes of determining when the "infringement" commenced in applying the limitation on statutory damages and attorney fees, federal courts have consistently held "that infringement commences for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs." *Johnson v. Jones*, 149 F.3d 494, 505 (6th Cir. 1998) (holding that the alleged acts of infringement that occurred after the copyright was registered do not constitute new acts of infringement but a continuation of the infringement that "commenced" prior to registration); *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1393 (C.D. Cal. 1993) (holding that "the first act of infringement in a series of ongoing separate infringements 'commence[s]' one continuing 'infringement' ") (brackets in original); *Singh v. Famous Overseas, Inc.*, 680 F. Supp. 533, 535 (E.D.N.Y. 1988) (holding that infringement does not "commence" with each new act in an ongoing infringement, because "it would be peculiar if not inaccurate to use the word commenced to describe a single act"), *aff'd*, 923 F.2d 845 (2d Cir. 1990); *Johnson v. University of Va.*, 606 F. Supp. 321, 325 (D. Va. 1985) (holding that infringement does not "commence" with each new act in an ongoing infringement, because "ascribing such a meaning to the term 'commenced' would totally emasculate section 412"); *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1331 (E.D. Pa. 1985) (holding that 'commencement of infringement' is "the time when the first act of infringement in a series of on-going discrete infringements occurs . . . would best promote the early registration of a copyright"), *aff'd on other grounds*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

<sup>3</sup> For the purposes of statutory damages, derivative works are considered part of the original work, but there is authority that for purposes of attorney fee recovery that derivative works are not part of the original work. See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 795 F. Supp. 501, 504 (D. Mass. 1992) (reasoning that Section 505 uses different wording from Section 504) (quoting Copyright Law Revision, H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 132, reprinted in 5 U.S. Code Cong. & Admin. News 5659, 5778 (1976)), *aff'd*, 36 F.3d 1147 (1st Cir. 1994).

<sup>4</sup> See *Johnson*, 149 F.3d at 504; *Budget Cinema, Inc. v. Watertown Assoc.*, 81 F.3d 729, 733 (7th Cir. 1996); *Hodge E. Mason & Hodge Mason Maps v. Montgomery Data, Inc.*, 967 F.2d 135, 143 (5th Cir. 1992); *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 849 (11th Cir. 1990); *Business Trends Analysts, Inc. v. Freedomia Group, Inc.*, 887 F.2d 399, 403 (2d Cir. 1989); *Whelan Assoc., Inc.*, 609 F. Supp. at 1330.

<sup>5</sup> See *ARP Films, Inc. v. Marvel Enter. Group*, 952 F.2d 643, 650 (2d Cir. 1991); *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1230 (7th Cir. 1991).

<sup>6</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); see also *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991); *Cable/Home Comm. Corp.*, 902 F.2d at 853.

<sup>7</sup> *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 783 (1989); *Cable/Home Comm. Corp.*, 902 F.2d at 853.

<sup>8</sup> See, e.g., *Branch v. Ogilvy & Mather*, 772 F. Supp. 1359 (S.D.N.Y. 1991) (awarding costs despite award of nominal damages); *Cable/Home Comm. Corp.*, 902 F.2d at 853 (holding that providers of pay television programming were the prevailing party when copyright damages were levied against the defendant for making, promoting, and distributing satellite scramblers).

<sup>9</sup> See *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1462 (1st Cir. 1990); *DSC Comm. Corp. v. DGI Tech.*, 81 F.3d 597, 600 (5th Cir. 1996); *Autoskill v. National Educ. Support Sys.*, 994 F.2d 1476, 1486 (10th Cir. 1993).

<sup>10</sup> See *Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997) (holding that a plaintiff seeking a preliminary injunction must demonstrate "either a likelihood of success on the merits and the possibility of irreparable injury or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor"), *cert. denied*, 523 U.S. 1118 (1998); *Richard Feiner & Co.*

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v. Turner Enter. Co., 98 F.3d 33, 34 (2d Cir. 1996) (holding that a plaintiff seeking a preliminary injunction must demonstrate (a) irreparable harm, and (b) either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly in its favor).

<sup>11</sup> See *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 690 (4th Cir. 1992); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989); *Concrete Mach. Co., v. Classic Lawn Ornaments*, 843 F.2d 600, 611 (5th Cir. 1988); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982), *superceded on other grounds as recognized in Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423 (7th Cir. 1985). *But see Plains Cotton Coop. Ass'n. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1261 (5th Cir. 1987) (“Th[e] presumption of irreparable injury] rule ... is not established in this circuit. On the contrary, we have made it clear . . . that preliminary injunctions will be denied based on a failure to prove separately each of the four elements of the four prong test.”) (footnote omitted), *cert. denied*, 484 U.S. 821 (1987).

<sup>12</sup> See *Kennedy v. National Juvenile Detention Assoc.*, 187 F.3d 690, 693 (7th Cir. 1999) (stating that copyright law is violated if the licensee exceeds the scope of the use); *MCA Televison, Ltd. v. Feltner*, 89 F.3d 766, 768 (11th Cir. 1996) (finding copyright jurisdiction where licensee broadcast copyright owner’s programs after licensor terminated the license); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (holding “a licensee infringes the owner’s copyright if its use exceeds the scope of its license” where the licensor’s former employees copied and modified software without its permission for use by the licensee); *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 20 (2d Cir. 1976) (finding a licensee infringes an owner’s copyright if its use exceeds the scope of the license); *Marshall v. New Kids on the Block P’ship*, 780 F. Supp. 1005, 1008 (S.D.N.Y. 1991) (holding that copyright jurisdiction was invoked where photographer alleged that licensee’s publication of photos was beyond the scope of the license).

<sup>13</sup> See *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998) (holding that a provision in a contract requiring the licensee to give notice of the licensor’s ownership was a covenant not a condition); *United States Naval Institute v. Charter Comm., Inc.*, 936 F.2d 692, 695 (2d Cir. 1991) (holding that a provision in the contract requiring the licensee to withhold publication of a book until October 1985 was a covenant; therefore, the licensee was liable in contract rather than in copyright for pre-October publication); *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1991) (holding that a provision requiring full payment of the contract price was a covenant rather than a condition precedent); *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997) (holding that public recognition of authorship and payment of costs were not conditions precedent to playing a song at the home games of a minor league baseball team); *Sun Microsystems, Inc. v. Microsoft, Inc.*, 81 F. Supp. 2d 1026, 1032 (N.D. Cal. 2000) (holding that software compatibility terms in a licensing agreement were covenants rather than conditions).

<sup>14</sup> Although the *Fantastic Fakes* case used Georgia state law on covenants, Alabama law is very similar: 1) clauses will be construed as covenants rather than conditions, see *Walker v. W.T. Smith Lumber Co.*, 226 Ala. 65;145 So. 572, 574 (1933) (holding that conditions subsequent are not favored and that courts should interpret clauses as covenants rather than conditions); *Murphy v. Schuster Springs Lumber Co.*, 215 Ala. 412; 111 So. 427, 431 (1926); 2) terms of a contract should be interpreted to avoid forfeiture, see *Protective Life Ins. Co. v. Thomas*, 223 Ala. 406; 134 So. 488, 489 (1931) (holding that forfeitures are looked upon by the courts with disfavor and will be strictly construed against party’s seeking a forfeiture); 3) all doubts in a contract should be construed against a drafter, see *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 513 (Ala. 2000). “It has been said that a condition differs from a covenant, in that it binds both parties, while a covenant is the promise of only one.” *Murphy*, 111 So. at 431.

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<sup>15</sup> See *Graham*, 144 F.3d at 237; *Jacob Maxwell, Inc.*, 110 F.3d at 752-753; *Rano*, 987 F.2d at 585; *RT Computer Graphics, Inc. U.S.*, 44 Fed Cl. 747, 756-57 (1999); *Glovaroma, Inc. v. Maljack Prod., Inc.*, No. 96 C 3985, 1998 WL 102742, at \*6 (N.D. Ill. 1998).

<sup>16</sup> Compare *Rano*, 987 F.2d at 586-587 (holding that the failure to pay 13.5% of the royalties was not a material breach); *Nolan v. Sam Fox Publ'g. Co.*, 499 F.2d 1394, 1399 (2d Cir. 1974) (holding that the failure to pay 74% of the royalties did not amount to a material breach) with *Dow Chem. Co. v. United States*, Nos. 97-5035, 97-5038, 2000 WL 1253830, at \*10 (Fed. Cir. Sept. 6, 2000) (affirming that the failure to pay any royalties is a material breach); *Columbia Pictures Tele. v. Krypton Broadcasting*, 106 F.3d 284, 290 (9th Cir. 1997) (holding that the failure to pay royalties was a material breach because a provision in the contract provided as such), *rev'd sub nom on other grounds*, *Feltner v. Columbia Pictures Tele.*, 523 U.S. 340 (1998); *ARP Films, Inc.*, 952 F.2d at 648 (finding that the failure to pay royalties pursuant to the licensing agreement was material as a matter of law).

<sup>17</sup> See also *Graham*, 144 F.3d at 238 n. 4 (finding that any award of contract damages would have to be subtracted from the actual damages in copyright to prevent a double recovery); *Deltak, Inc. v. Advanced Sys., Inc.*, 767 F.2d 357, 362 (7th Cir. 1985) (holding that the owner of a copyright is not allowed to recover its own lost sales and the infringer's profits if that results in double-counting of the same economic transaction, usually a sale to a third-party customer); *Bowers v. Baystate Tech., Inc.*, No. 91-40079-NMG, 2000 WL 1280340, at \*1 (D. Mass. Sept. 6, 2000) (finding that contract damages are the direct result of patent and copyright infringement; therefore, the damages are duplicative). *But see* *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 289 (2d Cir. 1999) (holding that recovery of damages for breach of contract and copyright infringement are permissible and do not constitute a double recovery); *Paramount Pictures Corp. v. Metro Program Network, Inc.*, 962 F.2d 775, 778-80 (8th Cir. 1992) (authorizing recovery for copyright infringement and breach of contract).

<sup>18</sup> See *Makedwde Publ'g Co. v. Johnson*, 37 F.3d 180, 182 (5th Cir. 1994) (holding that a defendant is only liable for acts of infringement that occurred within three years of the suit); *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481-82 (9th Cir. 1994) (holding in case of continuing infringement statute of limitations bars claims occurring more than three years before suit); *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir. 1992) (holding that each act of infringement constitutes a separate cause of action subject to the statute of limitations); *Hoste v. Radio Corp. of America*, 654 F.2d 11, 11 (6th Cir. 1981) (same). *But see* *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983) (adopting the continuing tort theory and holding that the defendant is liable for actions outside the limitations period which continue to cause harm to the plaintiff within the period).

<sup>19</sup> Although *United States v. Shabazz* was a criminal prosecution for copyright infringement applying the limitations for criminal actions, 17 U.S.C. § 507(a), the Eleventh Circuit relied on a civil case, *Baxter v. Curtis Industries, Inc.*, 201 F. Supp. 100 (N.D. Ohio 1962), in determining that the statute of limitations began to run on the date of the last infringement. Section 507(a) is written differently than the accompanying provision for civil actions, Section 507(b). Section 507(a) reads that the limitations period begins to run "after the **cause of action arose**" whereas Section 507(b) reads that the limitations period begins to run "within three years **after the claim accrued.**" 17 U.S.C. §§ 507(a), (b) (emphasis added). Whether this variance in the language allows *Shabazz*, which seemingly adopted a continuing tort theory, to be distinguished from subsequent civil cases is an open question.

<sup>20</sup> See *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994); *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992); *Prather v. Neva Paperbacks, Inc.* 446 F.2d 338, 341 (5th Cir. 1971).

<sup>21</sup> See *Prather*, 446 F.2d at 341; *Stone*, 970 F.2d at 1049-50 (holding that a plaintiff need not know of facts furnishing the cause of action, but only those facts that are sufficient to entitle the plaintiff to relief and finding that plaintiff had knowledge in 1979 that she might be the daughter of Hank Williams, Sr. and that she was not receiving money because of that fact; therefore, any cause of action she might have for copyright renewal deprivation occurring before September 12, 1982 was time barred).