

Oh Everly Brother, Whose Art Now: Repudiation of Copyright Authorship or Copyright Transfer *Everly v. Everly*, No. 19-5150, 2020 WL 2111312 (6th Cir. May 4, 2020)

By: Barry Irwin & Manon Burns | May 15, 2020

A contentious copyright opinion by the Sixth Circuit reversed the district court's summary judgment decision, finding that fact issues precluded summary judgment on whether one songwriter repudiated the other's co-authorship, or whether their agreement transferred ownership and, as such, could be terminated pursuant to 17 U.S.C. § 203. Between the three Circuit Judges, the ruling resulted in a majority opinion, a separate concurring opinion, and a separate dissenting opinion.

The *Everly* case centers on the authorship of the song *Cathy's Clown*, a popular song from 1960 performed by the Everly Brothers, Phil and Don. Both Everly brothers were initially credited as co-authors, and both received royalties from the publisher of the song, to whom the brothers had assigned the copyrights in the composition. Around 1980, Don Everly began to claim that he was the sole author of the composition, eventually entering into an agreement with Phil whereby Phil agreed to release all of his rights in the composition to Don. Following that agreement, Don received all royalties and public credit. The issue was whether this agreement effectuated a repudiation of authorship or a repudiation of ownership. If the former, it was too late for Phil's heirs to assert he was an author and terminate the agreement under 17 USC 203. If the later, it was not.

With proper notice, the owner of a copyright has the right to terminate a grant of that copyright after a period of time has passed. When his right to notice the termination of his copyright grant to the publisher arose in 2011, Don exercised it, claiming sole ownership of the composition. After Phil's death, his heirs *also* filed notices of termination—in 2014 to the publisher, and in 2016 to Don seeking to regain Phil's rights in the song from Don. The district court found that Don had repudiated Phil's authorship in 2011, triggering the statute of limitations on Phil's claim for authorship. As the statute of limitations had run, the district court found for Don Everly on summary judgment. On appeal, the Sixth Circuit considered whether Don had expressly repudiated his brother's authorship claim and triggered the statute of limitations in 2011.

A claim for copyright ownership must be brought within three years of a plain and express repudiation of ownership by one party against another. Express repudiation can be by direct communication, the publishing of the work without appropriate credit, or if a co-author learns that they are not receiving royalties which they are owed. The Sixth Circuit differentiated a claim for copyright *ownership* with a claim for copyright *authorship*, but found that express repudiation should also apply to an authorship claim to avoid uncertainty.

In considering Don's actions towards Phil, while there was disagreement among the judges as to when a repudiation of authorship claim accrues (at the time of ~~discovery of repudiation~~~~renewal~~ or upon ~~repudiation~~~~occurrence of an event creating a cognizable claim~~), the majority agreed there was an issue of fact as to whether repudiation of authorship occurred. Judge Guy, dissenting, believed that there was no question that Don expressly repudiated Phil's authorship claim more than three years before Phil's heirs filed suit.

The Sixth Circuit's decision demonstrates the importance of properly identifying authorship of copyrighted works from the outset and the risks associated with efforts to correct authorship after the fact. When such a situation arises, copyright owners should make clear in any settlement agreement that the issue of authorship is being resolved to avoid the possibility that the dispute may need to be addressed again 35 years later.