

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADELAIDA GARZA, Personal Representative for the
Estate of Isaac Donald Everly,

Plaintiff-Appellee,

v.

PATRICE Y. EVERLY; PHILLIP J. EVERLY; CHRISTOPHER
EVERLY; PHILLIP EVERLY FAMILY TRUST; EVERLY AND
SONS MUSIC (BMI),

Defendants-Appellants.

No. 21-5530

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:17-cv-01440—Aleta Arthur Trauger, District Judge.

Decided and Filed: February 10, 2023

Before: GUY, BUSH, and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: Jay S. Bowen, Jacob Clabo, SHACKELFORD BOWEN MCKINLEY & NORTON, LLP, Nashville, Tennessee, for Appellants. Philip M. Kirkpatrick, Joshua Counts Cumby, ADAMS AND REESE LLP, Nashville, Tennessee, for Appellee.

BUSH, J., delivered the opinion of the court in which GUY and MURPHY, JJ., joined. MURPHY, J. (pp. 12–15), delivered a separate concurring opinion.

OPINION

JOHN K. BUSH, Circuit Judge. “Phil and Don,” once again, are “knocking at the door.”¹ *See Everly v. Everly*, 958 F.3d 442 (6th Cir. 2020). The Everly Brothers are a famous musical duo known for many hits. *Cathy’s Clown* is the one at issue in this appeal. Older brother Isaac Donald Everly (“Don”) and younger brother Philip Everly (“Phil”) are now both deceased, but their estates² contest authorship over *Cathy’s Clown*. Don’s estate claims full authorship, while Phil’s estate claims co-authorship.

While both brothers may have co-authored the lyrics and tune as a matter of fact, Don’s estate alleges that Phil is no longer an author as a matter of copyright law. That is because Don allegedly expressly repudiated Phil’s authorship, triggering a three-year window for Phil to reassert authorship under the Copyright Act. On November 8, 2017, Don sued Phil’s estate for a declaratory judgment that Don is sole author of *Cathy’s Clown* and should receive the benefits therefrom. The district court granted Don summary judgment, and we reversed because there was a genuine issue of material fact as to whether Don repudiated Phil’s authorship. After a bench trial, the district court found that Don did repudiate Phil’s authorship and Phil failed to reassert that he was an author. The district court further determined that because Phil failed to reassert that he was an author, he was time-barred from asserting he was a co-author as a defense to Don’s suit. Phil’s estate contests this finding and, in addition, asserts that the three-year statute of limitations applies only to authorship claims, not defenses, and so it should be allowed to argue that Phil was an author to defend against Don’s suit. We hold that Don’s estate may rely on the statute of limitations here. Because the district court did not clearly err in finding that Phil failed to exercise his rights after Don repudiated his authorship, we AFFIRM.

¹PAUL MCCARTNEY & WINGS, *Let ‘Em In*, on WINGS AT THE SPEED OF SOUND (Capitol Records 1976).

²The term “estates” is used generally to refer to heirs, statutory successors, and other successors of right to any rights Don or Phil may have had in *Cathy’s Clown*.

I.

We briefly recite the history behind this case, as further detail can be found in our earlier opinion, *Everly v. Everly*, 958 F.3d 442, 445–47 (6th Cir. 2020). Although some facts are muddled given the long history of this case, we will rely on the trial court, which conducted a two-day bench trial on April 27 and 28, 2021. *See Everly v. Everly*, 536 F. Supp. 3d 276 (M.D. Tenn. 2021).

The year was 1960. *Cathy's Clown* was recorded, released, and copyrighted—eventually becoming one of the brothers' most famous songs. *Everly*, 958 F.3d at 445. The copyrights listed Phil and Don as authors, and both brothers were credited as co-authors and received royalties. Although the brothers shared credit for many years, over time, their relationship soured. Don, around 1980, began pressuring Phil to take his name off the song.³ The district court believed Don's testimony that he sent Phil a letter saying “you can give me my songs back,” which referred to *Cathy's Clown* and other songs. It also concluded based on witness testimony that Don placed a telephone call to Phil, during which Phil appears to have implied he was a co-author, but nonetheless allowed Don to take full authorship. On June 10 and 11, 1980, Phil signed five documents titled “Release and Assignment,” all notarized, related to *Cathy's Clown* and sixteen other works. The release related to *Cathy's Clown* states, “Phil Everly desires to release, and transfer, to the said Don Everly all of his rights, interests and claim in and to [‘Cathy's Clown’], including rights to royalties *and his claim as co-composer*, effective June 1, 1980.” Memorandum Opinion, R.103, at 15 (citation omitted) (emphasis added by district court).

The district court viewed this release as a signal that Phil acquiesced to Don's repudiation of Phil's authorship. Further, an email introduced at trial from Lewis Anderson, owner of a company that helps songwriters such as Phil recapture copyright ownership, indicates Phil acknowledged he made “an agreement with Don to remove himself as writer of ‘Cathy's Clown.’” The district court recognized some contradictory evidence of Phil's factual authorship, particularly a 1984 television interview (which postdates the 1980 release) during which Don

³Don claimed in this litigation that he had described *Cathy's Clown* as authored by both Everly brothers to maintain the image that they wrote their songs together.

explains the creation of *Cathy's Clown*: “I started a song, called Phil over, he came over and we worked—we hashed it out, and went into the studio.” Memorandum Opinion, R.103, at 19–20. But the district court determined that “worked” and “hashed it out” did not establish Phil’s contributions to writing lyrics or composition. In fact, Don asserted vehemently at trial that he alone wrote the entire song *Cathy's Clown*, testimony which the district court found “very credible.”

All in all, the district court found that, according to a preponderance of the evidence, “Don plainly and expressly repudiated Phil’s authorship” of *Cathy's Clown* by letter and telephone call in 1980, culminating in the 1980 “Release and Assignment.” This express repudiation triggered a three-year window for Phil to make an authorship claim under the Copyright Act—which Phil undisputedly failed to do.

The district court also rejected Phil’s estate’s argument that the three-year statute of limitations should not apply to the defense that Phil is co-author. While it is true that statutes of limitations do not usually apply to defenses, the district court viewed Phil’s authorship claim as “amount[ing] to” an affirmative claim. *Id.* at 22. It viewed Phil’s estate as “skirting” the statute of limitations by bringing a claim in the form of a defense. *Id.* at 25. Further, the district court noted that it was Phil’s estate which “sought to topple the status quo” by attempting to terminate the 1980 release. *Id.* at 27. Because Phil’s authorship claim was time-barred, the district court entered judgment for Don’s estate. *Id.* at 29–30.

II.

On appeal from a judgment entered after a bench trial, “we review the district court’s findings of fact for clear error and its conclusions of law *de novo*.” *Kehoe Component Sales Inc. v. Best Lighting Prods.*, 796 F.3d 576, 585 (6th Cir. 2015) (quoting *Beaven v. U.S. Dep’t of Just.*, 622 F.3d 540, 547 (6th Cir. 2010)). Phil’s estate raises three general arguments on appeal: (1) it contests the district court’s application of certain aspects of the Copyright Act’s scheme for handling authorship claims; (2) it argues the district court’s finding of express repudiation was error; and (3) it disagrees with the district court’s holding that the statute of limitations of three years for a copyright claim bars an authorship “defense.” We consider these arguments in turn.

III.

A copyright initially vests in the author or authors of a work. 17 U.S.C. § 201(a). Authors can transfer ownership of a copyright to, say, a publisher, which would grant said publisher exclusive rights to reproduce and distribute the work. *Everly*, 958 F.3d at 449. Authors, even if they transfer ownership, retain some rights, including a termination right, which allows authors to regain copyright ownership down the line. *Id.* at 449–450. Termination rights cannot be transferred. *Id.* at 450.

A person must bring a claim under the Copyright Act “within three years after the claim accrued.” 17 U.S.C. § 507(b). This three-year statute of limitations begins to run between co-authors when “there is a ‘plain and express repudiation’ . . . by one party as against the other.” *Everly*, 958 F.3d at 450 (quoting *Ritchie v. Williams*, 395 F.3d 283, 288 n.5 (6th Cir. 2005)). Such a claim “accrues only once,” at the time of repudiation. *Id.* at 450 (quoting *Roger Miller Music v. Sony/ATV Publ’g*, 477 F.3d 383, 390 (6th Cir. 2007)). Repudiation must come from someone claiming authorship, not a third party. *Id.* at 453. “Allowing authors to sleep on their rights even after they have been repudiated would inject instability into an area of copyright law that calls out for certainty.” *Id.*

Phil’s estate makes two arguments to avoid application of this scheme. First, it asserts that because termination rights are inalienable, the district court’s holding that Phil is not a co-author violates the Copyright Act by alienating his termination rights. Citing *Nimmer*, Phil’s estate notes that “authors and their successors may terminate copyright assignments in spite of any contractual device that purports to divest them of the right.” 3 Melville B. Nimmer and David Nimmer, *NIMMER ON COPYRIGHT* § 11.07. Therefore, the district court created a “work-around” to allow divestiture of termination rights.

We disagree. The district court nowhere held that authors can divest their copyright termination rights by contract. Rather, the statute of limitations plainly bars claims three years after they accrue, so adhering to that language gives effect to the statutory framework, rather than nullifying it. Authors who fail to bring a timely authorship claim no longer have termination rights to alienate.

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