Well I Wonder, Wonder...Who Wrote the *#!@%#*! Song: A Call for the Abolishment of Frivolous Lawsuits in the Music Copyright Infringement Arena Through the Right Mix of Existing Law

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WELL I WONDER, WONDER...WHO WROTE THE *#!@%#*! SONG: A CALL FOR THE ABOLISHMENT OF FRIVOLOUS LAWSUITS IN THE MUSIC COPYRIGHT INFRINGEMENT ARENA THROUGH THE RIGHT MIX OF EXISTING LAW*

Christine P. Fontana**

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"It is better to fail in originality than to succeed in imitation."
-Herman Melville

I. THE SUCCESSFUL SONGWRITER’S VICTIMIZATION THROUGH FRIVOLOUS COPYRIGHT INFRINGEMENT LAWSUITS

Songwriters who have hit the big-time in the world of music seem to have all of the right accouterments on their side: fame, fortune, prestige, support for projects from record companies, and long-time fans who are willing to buy more of whatever they have to offer. These famous artists seem to excel in everything they compose while to the small-time, fledgling songwriters who may work hard at similar goals that never reach the same fruition. Sometimes, the less successful songwriter as a plaintiff may feel enormously unprotected and insecure in a copyright infringement action in which he is pitted against a well-known artist, solely because of the artist’s sheer popularity and the experienced counsel artists of this magnitude are able to attain for representation.

However, it is not always the unknown songwriter who suffers in copyright infringement lawsuits. The well-known artist can also fall prey to actions which unjustifiably accuse him of the theft of the songs which are in actuality his own original creations. The exact amenities that pummeled a songwriter into superstardom can also drag him into court or drawn-out settlement negotiations with plaintiffs who are not even actual composers of the song in question. Perhaps these plaintiffs and their lawyers institute these copyright infringement lawsuits in an effort to reach the same type of success through a desired court-ordered fame or money. Baseless copyright infringement can affect anyone. Successful

Recent highly publicized courtroom dramas have focused an entire nation on the workings of our legal system, often spawning dismay and calls for reform. A less visible but equally disconcerting defect in our civil system also cries out for reform and, pending such reform, mandates the thoughtful attention of all music industry practitioners.

1 See Howard Siegel, Sitting Duck Songwriters and Frivolous Lawsuits, 9 ENT. ARTS & SPORTS L. J. 24 (1997). In his article, Mr. Siegel addresses the seriousness of frivolous music copyright infringement lawsuits and suggests careful consideration of this issue from practitioners:
songwriters and their lawyers are just as prone to headaches and heartaches over the wrongful use of their songs as would be a less successful plaintiff/songwriter who discovers that another has misappropriated his work.  

Frivolous lawsuits pertaining to infringement in music copyrights have caused much concern for practitioners in this area. When established songwriters stand accused of copyright infringement, cases are often decided on summary judgment motions. If the songwriter wins his motion, he has still invested time and incurred costs for his defense. If he loses, he proceeds to trial where he can possibly triumph on the merits. Even if he does prevail at trial, however, resources have been spent in preparation for litigation. In either case, the successful songwriter has expended much effort, time and money defending himself and his own independent creation, usually without receiving any type of restitution (i.e., attorney's fees) under the Copyright Act. A successful defense against an infringement claim can hardly be

2. Id.

3. See generally Id. See also Irwin Chusid, Lip-Sync Court Verdict is Travesty; Buyers of Album Got the Music They Wanted BILLBOARD, Oct. 26, 1991, at 10, Twenty-six separate lawsuits concerning the Milli Vanilli lip-sync controversy were filed against Arista Records, the group's label, by the alleged victims. Id. A Cook County judge in Chicago gave preliminary approval to a settlement of a class action suit that arose from Fabrice Morvan and Rob Pilatus' admission that they had not actually sung on their "Girl You Know It's True" album. Id. The settlement proposed that individuals providing proof of purchase of the album would be entitled to a $1.00 rebate for Milli Vanilli singles, $2.00 for vinyl albums and cassettes, and $3.00 for videos and compact discs. Id. "The national pastime isn't baseball. And it isn't football or sex. It's frivolous litigation." Id.

4. "Summary judgment will be granted only if the movant shows that (1) there is no genuine issue as to any material fact, and (2) movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. See Also Celotex Corp. v. Catrett, 477 U.S. 317 (1986); See also Alan J. Hartnick, Summary Judgment in Copyrights from Cole Porter to Superman, 3 CARDozo ARTS & ENT. L.J. 53 (1983) (recognizing that summary judgment is appropriate in copyright infringement cases).

5. See 17 U.S.C. § 505 (1996) (providing for costs and attorney's fees at the court's election as remedies for copyright infringement). Although attorney's fees are a possible remedy for copyright infringement, it is not the normal practice of courts to grant them. Lieb v. Topstone Indus., 788 F.2d 151, 154 (3d Cir. 1986) (holding that the prevailing party should not be awarded attorney's fees as a matter of course in every case).
called "winning" the case when the defendant pays an enormous cost for representation without receiving reimbursement.\(^6\)

One can envision the problems that develop when a certain artist is constantly sued, especially when the artist consistently prevails at trial.\(^7\) Not only do financial concerns arise, but the time which an "alleged" infringing defendant expends litigation meritless suits detracts from the time he spends being a creative artist.\(^8\) Through frivolous copyright infringement lawsuits, the songwriter evolves into a victim of the legal system, anchored by the very artistic endeavors that she expects to be protected by the law.\(^9\)

This paper proposes that courts and practitioners employ a combination of several aspects of existing law in an effort to annihilate frivolity in music copyright infringement litigation. Part II outlines the standard of proof for establishing copyright infringement. Part III addresses the lack of guidance from courts in determining what elements constitute frivolous actions in music copyright infringement lawsuits. Part IV tracks Fogerty v. Fantasy and discusses its relevance in aiding future defendants in copyright infringement litigation by its elimination of the "dual standard." Part V details the success of frivolity claims by defendants in copyright infringement actions, examining Fogerty, Section 505 of the Copyright Act,\(^{10}\) Federal Rule 11,\(^{11}\) the American Bar Association Model Rules of Professional Conduct,\(^{12}\) and the British

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6. See Warner Bros. Inc. v. Dae Rim Trading, Inc., 695 F. Supp. 100, 111 (S.D.N.Y. 1988), rev'd, 877 F.2d 1120 (2d Cir. 1989). A survey taken in 1985 concluded that "the average cost of a copyright litigation through trial in New York City was between $58,000 and $107,000, with a median cost of $87,000." Id.

7. Michael Jackson has served as a successful defendant in two recent bouts of copyright infringement litigation. See Cartier v. Jackson, 59 F.3d 1046 (10th Cir. 1995); Smith v. Jackson 84 F.3d 1213 (9th Cir. 1996).

8. "[I]f there were fewer baseless infringement lawsuits, artists, writers, publishers, and record labels could spend less time as defendants and more time as artists and creators, and the rest of us would benefit from the additional fruits of their labor." Robert G. Sugarman & Joseph P. Salvo, Fogerty Lends Credence to Copyright Law, BILLBOARD, March 19, 1994, at 8.

9 "Every successful songwriter is a potential target for meritless copyright infringement lawsuits--and, under the present system, an all too easy one." Siegel, supra note 1, at 24.


11. FED. R. CIV. P. 11.

II. ESTABLISHING MUSIC COPYRIGHT INFRINGEMENT: ARNSTEIN V. PORTER AND OTHER SUBSEQUENT JURISPRUDENCE

A. Arnstein v. Porter

The most commonly employed music copyright infringement test is found in Arnstein v. Porter. In Arnstein, Ira Arnstein brought a music copyright infringement action against composer Cole Porter, claiming Porter infringed on several of his musical compositions. The court in Arnstein set the standard of proof necessary to establish copyright infringement of a musical composition, which consists of a plaintiff proving (a) that the defendant has copied from the plaintiff’s copyrighted work, and (b) that the copying, assuming it to be proved, went so far as to constitute improper appropriation.

The court stated that the evidence to prove copying can either consist of defendant’s admission that he copied, or of circumstantial evidence through the defendant’s access to the plaintiff’s works, from which the trier of fact can reasonably infer copying. The court added that no amount of evidence will suffice to establish copying if no similarities between the works exist, but if evidence of both access and similarities exist, the similarities must be sufficient in order to prove copying. If there is no

15. Arnstein 154 F.2d at 464. The action was dismissed on Porter's motion for summary judgment. Id. at 467.
16. Id. at 468. Also, as with any copyright action, a plaintiff must prove his ownership of a valid copyright by showing: (1) originality in the author; (2) copyrightability of the subject matter; (3) the citizenship status of the author in order to permit a copyright claim; (4) compliance with the applicable statutory formalities; and (5) (if the plaintiff is not the author), a transfer of rights or other relationship between the plaintiff and the author so as to constitute the plaintiff as the valid copyright claimant. 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.01[A] (1996).
17. Arnstein, 154 F.2d at 468.
18. Id.
evidence of access, the *Arnstein* court asserted that "the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."19

Unlawful appropriation, or illicit copying, would arise only if copying were established.20 The court discussed the fact that in some cases, the similarities are so striking between the plaintiff's and defendant's work that an inference of copying is justified in order to prove improper appropriation.21 "But such double-purpose evidence is not required; that is, if copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying."22

The *Arnstein* court discussed the "lay-listener" test, which employs the reactions of the jury in making an assessment of the misappropriation of a composition.23 At trial, the plaintiff may play the songs in such a manner that they may seem to a jury to be "inexcusably alike, in terms of the way in which lay listeners of such music would be likely to react."24 The court stated that the plaintiff may also utilize the expert testimony of musicians to aid in determining the reactions of lay auditors, but stressed that this testimony would in no way be controlling on the issue of illicit copying.25

Other cases have expanded on the lay listener test. Through *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,26 and *Selle v. Gibb*,27 the courts have continued to focus on the "lay listener" test, while adding other factors to determine whether copyright infringement has taken place.

19. *Id.*
20. *Id.*
21. *Id.*
22. *Arnstein*, 154 F.2d at 468.
23. *Id.* at 473.
24. *Id.*
25. *Id.* "The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation; for the views of such persons are caviar to the general--and plaintiff's and defendant's compositions are not caviar." *Id.*
27. 741 F.2d 896 (7th Cir. 1984).
In *Harrisons*, former Beatle George Harrison's popular song, "My Sweet Lord," was accused of being plagiarized from the successful earlier song, "He's So Fine."

Instead of solely focusing on jury lay listeners, the court relied more on the expert witnesses used by each side and Harrison’s access to “He’s So Fine.” The court stated that Harrison arrived at a particular combination of musical sounds “that pleased him as being one he felt would be appealing to a prospective listener.” The court reasoned that Harrison knew this combination of sounds that formed “My Sweet Lord” would work because his subconscious mind was aware that it had worked before in the song “He’s So Fine.”

While the court emphasized that it believed Harrison did not deliberately copy the music of “He’s So Fine,” it nevertheless stated that it was clear that “My Sweet Lord” was the very same song, but with different words, as “He’s So Fine,” and that Harrison had access to the Chiffon’s song. The court held that a subconsciously accomplished copyright infringement had occurred.

### C. Selle v. Gibb

28. *Harrisons Music*, 420 F. Supp. at 178. "He's So Fine" was composed by Ronald Mack and recorded by the popular group The Chiffons. *Id.* Bright Tunes Music Corporation is the owner of the copyright of the song. *Id.*

29. *Id.* at 178, 181.

30. *Id.* at 180.

31. *Id.*

32. Even Harold Barlow, Harrison's own experienced expert witness, acknowledged that although the two motives of the songs were part of the public domain, their implementation here was so unusual that he had never come across such a unique sequential use of the sounds. *Id.* at 180 n.11.

33. *Harrisons Music*, 420 F. Supp. at 180-81. The court believed that Harrison was aware of "He's So Fine" because the song was number one for five weeks on the Billboard charts in the United States, in England, Harrison's home land, it was number twelve on the charts on June 1, 1963, which was the same date that a Beatles' song was number one. *Id.* at 179. "He's So Fine" was one of the top hits in England for seven weeks in 1963. *Id.*

34. *Id.* at 181.
In *Selle v. Gibb*, the Seventh Circuit relied even more on access for determining whether copyright infringement had occurred. Ronald Selle, an unknown composer, brought suit against the three Gibb brothers, Barry, Robin, and Maurice, who were known collectively as the internationally known singing group, the Bee Gees, claiming that the Bee Gees' hit tune "How Deep Is Your Love" had infringed the copyright of his song, "Let It End." The extent of the public dissemination of Selle's song was very limited; he played "Let It End" several times with his small band in the Chicago area, and sent tape recordings and sheet music of the song to eleven music recording and publishing companies.

On the other hand, the Bee Gees had composed over 160 songs and their records, tapes, and sheet music had been distributed worldwide, with some of their albums selling more than 30 million copies. The expert witness was of the opinion that the two songs could not have been written independent of each other because they had such striking similarities. Although the jury returned a verdict in favor of Selle, the trial court granted the Bee Gees' motion for judgment notwithstanding the verdict. The court relied primarily on Selle’s inability to demonstrate that the Bee Gees had access to "Let It End" and stated that without access, regardless of how similar the two compositions may be, a claim of copyright infringement could not stand. Therefore, because Selle failed to establish a basis from which the jury could reasonably infer that the Bee Gees had access to "Let It End" and because he did not prove "striking similarity" between the two songs, the Seventh Circuit affirmed the trial court’s decision.

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35. 741 F.2d 896 (7th Cir. 1984).
36. *Id.* at 898.
37. *Id.* Three of the companies did not respond, and eight of the companies returned the materials to Selle. *Id.*
38. *Id.* at 898-99.
39. *Id.* at 899. Arrand Parsons, the only expert witness to testify at trial, was a music professor at Northwestern University who had extensive professional experience. *Id.* Dr. Parsons used several charts and a comparative recording which was prepared under his direction for his testimony. *Id.*
40. *Selle*, 741 F.2d at 899.
41. *Id.* at 899-900.
42. *Id.* at 905-06.
D. The Jackson Cases

Michael Jackson, one of the most popular modern composers in the world, has been the target of recent copyright infringement litigation, where he prevailed in two separate actions: *Cartier v. Jackson* and *Smith v. Jackson.* In *Cartier,* singer-songwriter Crystal Cartier sued Michael Jackson and others for copyright infringement of her song entitled "Dangerous" that she allegedly wrote in 1985 and recorded in October of 1990. Cartier claimed that in January 1988, she recorded "Dangerous" as part of another song entitled "Player." Jackson also recorded a song called "Dangerous" in September of 1990. Jackson asserted that he wrote his version of "Dangerous" in 1985 during a collaboration with William Bottrell. In attempting to prove that Jackson had access to her version of "Dangerous" before September 1990, Cartier tried to demonstrate that she distributed approximately 25 demo tapes of "Player" to people who were close to Jackson in Los Angeles. However, Cartier had no remaining copies of the demo tape; she claimed that her entire supply of cassettes was depleted and that since the original recording was created on a rented master tape that was recycled by the recording studio, that copy had also vanished.

In response to a motion in limine, the district court excluded the secondary evidence that Cartier wanted to introduce in order to prove the contents of the cassettes. The basis for this exclusion

43. 59 F.3d 1046 (10th Cir. 1995).
44. 84 F.3d 1213 (9th Cir. 1996). In addition to the copyright claims, the plaintiffs also brought a RICO claim against defendants, alleging that Jackson, Richie, and Temperton's dissemination and marketing of the songs were mail and wire fraud predicate acts under RICO. *Id.* at 1216. The court held that the plaintiffs' RICO claims were actually based on copyright infringement, and because copyright infringement is not a RICO predicate act under 18 U.S.C. 1961, the court dismissed the plaintiffs' RICO claims. *Id.*
45. *Cartier,* 59 F.3d at 1047.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 1047-48.
50. *Cartier,* 59 F.3d at 1048.
51. *Id.* In order to show the contents of the lost cassettes, Cartier attempted to introduce chord and lyric charts of the version of "Dangerous" that was on
was that Cartier had not made a significantly diligent search for the copies of the demo tapes.\textsuperscript{52} The jury rendered a verdict in favor of Jackson and Cartier appealed.\textsuperscript{53} Affirming the ruling of the district court in favor of Jackson\textsuperscript{54}, the Tenth Circuit interpreted the district court's conclusion that the secondary evidence was not a fair or accurate depiction of the original tape as a finding that the secondary recordings would mislead the jury.

Michael Jackson also played the role of defendant in copyright infringement litigation in \textit{Smith v. Jackson},\textsuperscript{55} where he and others, including Lionel Richie and Rod Temperton, were sued by Robert Smith and Reynaud Jones for alleged infringement of six of the plaintiff's songs.\textsuperscript{56} The plaintiffs did not argue that the defendants copied the lyrics or any large parts of the music; instead, they alleged that Jackson and the others misappropriated musical "motives" from each of the plaintiff's works.\textsuperscript{57}

The trial court granted summary judgment for Jackson on several of the infringement claims because the plaintiffs had failed to rebut the defendants' experts declarations that the allegedly infringing motives were actually unprotected "scenes a faire."\textsuperscript{58} The jury concluded, on the three surviving claims that went to trial, that none of the defendants' compositions were "substantially similar"
to any of the plaintiffs' songs under the ordinary lay listener test. Since the jury answered "no" to the "substantially similar" question, that was the end of the case. The plaintiffs appealed to the Ninth Circuit claiming that the jury should have been asked about "access" first so that they could consider "access" in deciding whether the songs were "substantially similar." This contention was rejected by the court, which stated that "[a]lthough access was relevant to the extrinsic test, we have not incorporated considerations of access into the intrinsic 'lay listener' inquiry." Therefore, the court affirmed the ruling of the district court in favor of Jackson and the other defendants.

III. WHAT CONSTITUTES FRIVOLITY: A LACK OF GUIDANCE FROM THE COURTS

While courts have provided the standard of proof necessary for determining whether copyright infringement has occurred, the courts have not been so generous in outlining what constitutes frivolity in a music copyright case. "Frivolousness, like madness and obscenity, is more readily recognized than cogently defined." However, it is of peculiar circumstance that the case which propounded the standard of proof for copyright infringement was a case that involved a most dubious plaintiff. In Arnstein v. Porter, Cole Porter survived an infringement action instituted by Ira...

59. Id. at 1216-17.
60. Jackson, 84 F.3d at 1220.
61. Id.
62. Id. The court stated that it used a two-part test for determining whether two compositions are substantially similar. Id. at 1218. The "extrinsic" test is based on external, objective criteria, and considers whether two works share a similarity of expression and ideas. Id. Expert testimony and analytic discussion of a work are appropriate for the extrinsic test. Id. If the plaintiff satisfies the extrinsic test, then the subjective "intrinsic" test comes into play to inquire whether an "ordinary, reasonable observer" would find that a substantial similarity of expression of the shared idea existed between the two works. Id.
63. Id. at 1221.
65. Arnstein, 154 F.2d at 464.
Arnstein, along with a multitude of other composers that Arnstein sued through several lawsuits during the 1930's and 1940's for music copyright infringement. 66 In his original complaint against Porter, Arnstein prayed for "at least one million dollars out of the millions the defendant has earned and is earning out of all the plagiarism." 67 Arnstein claimed that Porter "had stooges right along to follow me, watch me, and live in the same apartment with me," and asserted that his apartment had been ransacked several times. 68 When Arnstein was questioned about how he knew that Porter had something to do with any of these "burglaries," he stated, "I don't know that he had to do with it, but I only know he could have ... many of my compositions had been published. No

66. Id., See e.g. Arnstein v Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936); Arnstein v. Broadcast Music, Inc., 137 F.2d 410 (2d Cir. 1943). The litigation that Porter was entangled in with Arnstein has been mentioned in biographies concerning the famous composer-lyricist:

Another annoyance for Cole that practically coincided with his bad press for Seven Lively Arts was the report from Warner Brothers on December 27, 1944, that tunesmith Ira Arnstein, a persistent litigant in the courts against famous songwriters, had threatened suit, presumably over the studio's planned production of Cole's movie biography. According to the studio's legal department, Arnstein claimed that Cole had plagiarized a number of his compositions and submitted various manuscripts as well as printed material to support this allegation. In their report Warner Brothers made clear that they considered Arnstein's claim "absolutely ridiculous," but warned that "if Arnstein follows his usual course he can become an awful nuisance." And Arnstein did. He sued Cole for a million dollars, claiming plagiarism. In the two-week-long jury trial that followed, Monty Woolley, Deems Taylor, and Sigmund Spaeth all appeared in Cole's defense to support his contention that he had never taken material from Arnstein. Cole also testified that he neither knew Arnstein nor was familiar with his work. When the case finally went to the jury it was dismissed as being without merit after a deliberation of nearly two hours. But though Cole won the case, it was perhaps a result of the experience gained from this trial that, when asked if he ever went out without a carnation in his buttonhole, Cole answered, "Only when I'm being sued, because a carnation in the buttonhole never helps your case before a jury."


67. Arnstein, 154 F.2d at 467.

68. Id.
one had to break in and steal them." Yet in his depositions, Arnstein gave no direct evidence that Porter saw or heard any of his compositions.

Cole Porter moved for dismissal of this action on the ground of "vexatiousness." Attached to his motion papers were the court records of five prior copyright infringement suits brought by Arnstein against other persons in which judgments had been entered after trial against Arnstein. The Second Circuit believed that it would be improper to give weight to any other actions that the plaintiff may have lost. However, the court did state that "[w]hen a particular suit is vexatious, sometimes at its conclusion the court can give some redress to the victorious party. Perhaps the Legislature can and should meet the problem more effectively."

Although the court refused to strike Arnstein's demand for a jury trial, the court claimed that his testimony, as to the "stooges" and the like, did seem a bit "fantastic." It seemed the court was on the verge of establishing that Arnstein was guilty of bringing a frivolous lawsuit against Porter, yet it declined to take advantage of this opportunity to spell out factors which might be relevant in defining what comprised a frivolous lawsuit. In his dissent, Judge Clark mentioned several issues which could possibly suggest that Arnstein brought a frivolous copyright infringement claim against Porter. Judge Clark claimed that Arnstein's vague and reckless charges of burglary were a repeated feature of his plagiarism cases. He also stated, "[o]f course it is error to deny trial when there is a genuine dispute of facts; but it is just as much error--perhaps more in cases of hardship, or where impetus is given to strike suits--to deny or postpone judgment where the ultimate legal result is clearly indicated."

69. Id.
70. Id. at 478.
71. Id. at 474
72. Arnstein, 154 F.2d at 474.
73. Id. at 475.
74. Id.
75. Id. at 469.
76. Id. at 478 n.3.
77. Arnstein, 154 F.2d at 480. Judge Clark's statement is aligned with the idea that section 505 of the Copyright Act exists in order to encourage people to assert colorable copyright claims. NBC v. Sonneborn, 630 F. Supp. 524, 542
Although Arnstein may be regarded as a plaintiff who blatantly institutes baseless lawsuits, certain other cases have suggested that frivolity exists in copyright infringement litigation. In the Cartier v. Jackson case, the comparison tapes that Cartier wanted to introduce as secondary evidence contained excerpts from both Jackson’s and Cartier’s versions of “Dangerous,” but the tempo of the Jackson tape was slowed and the key of the song was altered from the original key in order to accommodate this slowing. Various excerpts “were looped back on themselves” in order to repeat musical phrases that were not repeated in either Jackson’s nor Cartier’s original song. Also, the tapes spliced together parts of the choruses that were not adjacent in the original versions. Another curious factor is that neither Cartier nor her attorneys attempted to compel any of the record companies that she allegedly sent demo tapes to respond to her requests to return the tapes.

Even in the wake of Fogerty v. Fantasy, Inc., which lifted the requirement of finding frivolity and demonstrated that it is not always obvious that a frivolous lawsuit is filed, courts should still be amenable to recognizing evident elements of frivolity in cases.

(D. Conn. 1985).

78. Another example of Arnstein's alleged frivolity can be found in Arnstein v. Broadcast Music, Inc., 137 F.2d 410, 412 (2nd Cir. 1943), where the court alluded to the aggravation in dealing with Arnstein's ludicrous claims of infringement:

The appellant having failed to prove access seeks to have copying inferred from the similarity of the compositions. Here again he is met by the findings of the trial judge who in a most painstaking way heard the songs played again and again. With the relatively few musical intervals that exist and the vast amount of music in the public domain it is rash to infer that a sequence that may be found in a melody is copied from any particular song containing the same sequence, rather than taken from other sources. Id.

79. 59 F.3d at 1049.
80. Id.
81. Id.
82. Id.
83. Id. at 1048.
84. 510 U.S. 517 (1994).
85. Id. at 531-32.
86. Hermann, supra note 64, at 715. Although Mr. Hermann's article discusses the topic of frivolous criminal appeals, guidance for what a frivolous claim in any type of action may entail can be gleaned from his suggestions:
The incentive for discovering that frivolous elements exist in an infringement claim is that a court can dispose of the case before it goes to trial by looking at evidence, thereby affecting judicial economy by eliminating the need for the parties to go to trial.

IV. LENDING A HELPING HAND TO DEFENDANTS: *Fogerty v. Fantasy, Inc.*

The recent jurisprudential enactment of *Fogerty v. Fantasy, Inc.* is a treasure trove to composers trying to recover attorney’s fees spent on copyright infringement defenses. In *Fogerty*, the United States Supreme Court agreed to hear singer/songwriter John Fogerty’s petition for review of a Ninth Circuit ruling on a suit bought against him in 1985 by Fantasy, Inc., his former music publishing and distributing company. Fogerty had written the song “Run Through the Jungle” in 1970 and sold the exclusive publishing rights to Fantasy. In 1985, Fogerty published another song entitled “The Old Man Down the Road,” attained a copyright for the song and authorized Warner Brothers to distribute it. Fantasy filed an action for copyright infringement, claiming that “The Old Man Down the Road” was actually “Run Through the Jungle” with new words. The jury returned a verdict in favor of Fogerty, finding “The Old Man Down the Road” did not infringe on “Run Through the Jungle.” Although Fogerty prevailed at trial, the Ninth Circuit affirmed the denial of Fogerty’s motion for attorney’s fees. The court declined to abandon its “dual standard”

"Indeed, a frivolous appeal can be functionally, if not very helpfully, defined as one in which a capable lawyer devoted to his client’s best interests, after conscientiously searching the record and researching the law, can find nothing to argue with a straight face." *Id.*

88. *Id.* John Fogerty was the leader of Creedence Clearwater Revival (CCR), a band recognized as one of the greatest American rock and roll groups of all time. *Id.* at 519 n.2. CCR's distinctive style of music, which had a "southern country and blues feel" to it, was dubbed "swamp rock" by the media. *Id.*
89. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1526 (9th Cir. 1993).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
for awarding attorney's fees under section 505 of the Copyright Act, which generally awards attorney's fees to prevailing plaintiffs as a matter of course. However, defendants must show that the original claim was brought in bad faith or was frivolous. The Court decided that section 505 no longer requires a prevailing defendant to make a showing of frivolity or bad faith in order to recover attorney's fees in a copyright action. Instead, the Court adopted the "evenhanded" approach, where no distinction is made between prevailing plaintiffs and prevailing defendants. The Court further held that attorney's fees are to be awarded to prevailing parties only as a matter of discretion by a court. It considered a list of non-exclusive factors to be considered in awarding attorney's fees to prevailing copyright litigants, including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Fogerty was awarded reasonable attorney's fees and costs pursuant to section 505, in the amount of $1,351,369.15. This is the highest amount ever awarded to date for attorney's fees in a copyright infringement case, and is likely to have a major effect on quelling the amount of frivolous copyright suits that abound in the music industry.

V. MAKING THE SUCCESSFUL FRIVOLITY CLAIM: OTHER APPENDAGES OF LAW TO ADD TO THE FOGERTY CASE

In order to abolish the filing of frivolous claims in music copyright litigation, practitioners can combine the Fogerty case

94. Fogerty, 510 U.S. at 521.
95. Id. at 535.
96. Id. at 536.
97. Id.
98. Id. at 535 n.19, citing Lieb v. Topstone Indus., 788 F.2d 151, 156 (9th Cir. 1986) (emphasis added).
100. "It's my feeling, and the feeling of those in the music industry that I've talked to... that, yes, there will probably be fewer frivolous cases on the part of plaintiffs." Quote from Fogerty attorney Kenneth Sidle, in Bill Holland, Court Rules That Fogerty May Seek Attorney's Fees, BILLBOARD, March 12, 1994, at
with several other existing legal premises to effectuate a desired result for the defense of their clients.\textsuperscript{101} Although the main hope of constructing this defense would be to serve as a deterrent for filing frivolous lawsuits, it would also serve as an effective method of collecting remedies and restitution for defendants who prevail at trial. The fact that attorney's fees are seldom granted to a successful defendant and that sanctions and disciplinary measures are rarely brought against or enforced upon a lawyer who brings a meritless claim allows this deceptive practice to continue.

\textit{A. Section 505}

Section 505 of the Copyright Act is perhaps the most powerful factor to be appended to the \textit{Fogerty} case in establishing a deterrent for the filing of frivolous lawsuits by plaintiffs.\textsuperscript{102} Under

\begin{quote}
What other options are open to the attorney seeking to ameliorate the broad exposure of a sitting duck songwriter client? ... [A] forceful argument can be made that those sharing in the benefits of a song's success (for example, the music publisher or record company) should also be willing to share in the risks of an unfounded challenge to this underlying copyright.
\end{quote}

\textit{Id.} Mr. Siegel also entertains the idea of a clause in the publisher/songwriter contract for the reimbursement of partial costs and attorney's fees in defense of a palpably frivolous infringement claim. \textit{Id.} "Another area of potential protection is insurance. In a rare case, the writer might be able to convince his music publisher to add the writer's name to the publisher's policy as an additional insured (perhaps for contributory fees). \textit{Id.}"

\textit{Id.} 17 U.S.C. § 505 (1996) provides:

\begin{quote}
In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or of an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.
\end{quote}

\textit{Id.} Also, the requirement of a party to pay attorney's fees under the Copyright

\textsuperscript{101} The scope of this paper is limited to crafting an argument for disposing of frivolous infringement claims through laws already in existence. For a discussion on suggested actions that may be pursued by a defendant songwriter, \textit{See Siegel, supra note 1, at 25:}

\textit{Id.}
Section 505, reasonable attorney's fees can be awarded to prevailing litigants in copyright infringement claims. Yet, section 505 is not applied in every case; even after Fogerty, courts still have the discretion to uphold or deny a prevailing party's request for attorney's fees and costs.

There are certain factors to consider when evaluating a case for the award of attorney's fees. Frivolity is one of those factors. Attorneys should emphasize this when an action seems to be frivolous in its claim of copyright infringement.

Some cases have held that attorney's fees should be routinely awarded under section 505. Defense attorneys should urge for a stronger application of these holdings to their own cases. At the very least, a prevailing composer should be entitled to attorney's fees incurred for the defense of a frivolous claim, which could only be considered restitution for his out-of-pocket expenses.

B. Rule 11

Rule 11 of the Federal Rules of Civil Procedure provides that a

Act seems to be analogous to the imposition of sanctions on attorneys for filing frivolous claims. FED. R. CIV. P. 11.

103. Id.

104. Fogerty, 510 U.S. at 533 (1994). The Court stated, "The statute [section 505] says that 'the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.' The word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." Id.

105. Id. at 534 (citing the Lieb factors, namely frivolousness, motivation, objective unreasonableness, both in the legal and factual components of the case, and the need in particular circumstances to advance considerations of compensation and deterrence).

106. Id.

107. See, e.g., Jasperilla Music Co. v. Wing's Lounge Ass'n., 837 F. Supp. 159, 162 (S. D. W. Va. 1993) (holding that an award of attorney's fees under section 505 is the rule rather than the exception, and the court need not find that the case is exceptional in order to award them); Engel v. Teleprompter, 732 F.2d 1238, 1241 (5th Cir. 1984) (holding that attorney's fees should be routinely awarded under 505 and that the award should be the rule rather than the exception); Little Mole Music v. Spike Invest., Inc., 720 F. Supp. 751, 757 (W.D. Mo. 1989) (holding that although attorney's fees are awarded at the discretion of the trial court, the award is the rule rather than the exception and attorney's fees should be awarded routinely).
lawyer make no frivolous claim in his representations in court.\textsuperscript{108} Rule 11 also provides for attorney's fees in the event a lawyer does make a frivolous argument.\textsuperscript{109} In reality, however, Rule 11 sanctions are rarely levied against attorneys for instituting frivolous actions, even though there is widespread concern for this practice.\textsuperscript{110}

"Frivolous litigation has been attributed to various characteristics of American society: our litigious instinct, our emphasis on substantive rights and entitlements, an overpopulation of lawyers in need of business, and a procedural system that is based on an ideal of open access to courts."\textsuperscript{111} Courts should not be tolerant of frivolity, and lawyers should make full

108. \textit{FED. R. CIV. P. 11} provides in pertinent part:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-- ...

2) the claims, defenses, and other legal contentions therein are warranted by existing law \textit{or} by a nonfrivolous argument for the extension, modification, or reversal of existing law \textit{or} the establishment of new law.\textit{Id.}

109. \textit{FED. R. CIV. P. 11(C)} provides in pertinent part:

Sanctions. If after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.\textit{Id.}


The litigiousness of American society has been the focal point of much recent debate over judicial reform. As more lawsuits than ever are being filed, docket congestion grows, making it hard for even the most righteous cases to be heard within a reasonable time. Whether or not frivolous litigation is principally responsible for this court congestion, it is perceived as a serious and perennial problem.\textit{Id.}
implementation of Rule 11 in order to assist courts in imposing fines on other lawyers who file frivolous claims.

C. Professional Responsibility

A lawyer can be subject to disciplinary action from the bar for making a frivolous claim under the Model Rules of Professional Conduct.\(^\text{112}\) Like Rule 11 sanctions, attorneys are almost never disciplined for instituting frivolous copyright infringement actions. Lawyers should propose to courts that professional discipline should be a more readily used option for their peers who bring baseless claims. "As officers of the judicial system, lawyers are responsible for controlling the quality of suits that are litigated."\(^\text{113}\) This should be strongly considered, especially in light of the current trend of public opinion which perceives the legal profession as being steadily denigrated over time.\(^\text{114}\)

D. British Rule

Americans stand to learn much from the so-called "British Rule," which allows for automatic attorney’s fees, while the "American Rule" demands the awarding of attorney’s fees be left

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112. \textit{MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.1 (1996)} provides in pertinent part, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." \textit{Id.}

113. \textit{See} Root, \textit{supra} note 110, at 303.

114. \textit{See}, e.g., Siegel, \textit{supra} note 1 & 9; \textit{See also} C. Garrison Lepow, \textit{Deconstructing Los Angeles or a Secret Fax From Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education}, 26 U. Mich. J.L. Ref. 69, 70 (1992). "Many people perceive the work of lawyers as a powerful, prohibitively destructive force. \textit{Id.} Lawyers are 'like nuclear warheads. They have theirs so you need yours--but once you use them they fuck up everything. They're only good in their silos.' \textit{Id.} at 70, n.3, \textit{citing} JERRY STERNER, OTHER PEOPLE'S MONEY 58 (1989). One of popular culture's conventional topics is that lawyers hold different values than the average person." \textit{Id.} at 70, n.4, \textit{citing} to Murphy Brown (CBS television broadcasts, Nov. 14, 1988 to present), which depicts Brown constantly reminding a corporate lawyer not to let his tail get caught in the door as he leaves. \textit{Id.}
to the discretion of the court. The American Rule has encouraged the initiation of frivolous litigation. Individuals can simply gain access to discovery which they use to determine if they have any claim at all, instead of implementing it to discover evidence that would support a legitimate claim. Also, the American Rule enables plaintiffs to bring nuisance or “strike suits” against defendants, which are baseless actions brought solely to force the defendant into a settlement for an amount somewhat less than the potential cost of full-fledged litigation. The only common law jurisdiction in which legal expenses, including attorney’s fees, are not automatically shifted to the unsuccessful party is that of the United States.

On the other hand, the British Rule is premised on providing full compensation to the prevailing party, not on punishing the losing party or deterring frivolous litigation, although the rule has had the effect of reducing frivolous litigation. John Fogerty attempted to advance the British Rule in his argument to the Supreme Court, but failed. Nevertheless, this does not render the argument null. The proponent of applying the British Rule can use the rule in order to enhance the defense’s argument for collecting attorney’s fees in the event that a frivolous copyright infringement action is found to be instituted against him.

VI. CONCLUSION

Unscrupulous opportunists can be found in all walks of life, whether rich or poor, famous or unknown or successful or unsuccessful. Sometimes they are found in the music litigation arena, projecting wholly meritless copyright infringement claims against successful songwriters in an attempt to take advantage of the independently created works of the wrongfully accused defendants. The institution of frivolous copyright infringement

115. Fogerty, 510 U.S. at 518.
116. See Root, supra note 110, at 306.
117. Id.
118. Id. at 304.
119. Id. at 307-08.
120. Fogerty, 510 U.S. at 518.
actions is a slap in the face of successful songwriters and a weight around the neck of judicial economy. This paper begs the attention of those intimately involved in this area, mainly judges and practitioners in the music industry, to hone their legal skills to rectify and hopefully abolish this dishonest and undignified practice. The answer may lie in a concerted effort for creating a manageable deterrence plan, followed by the vigorous enforcement of available remedies for defendants when plaintiffs persist in filing frivolous music copyright infringement actions.