

**Texas Intellectual Property Law Journal**  
Winter, 1994

Recent Development

**RECENT DEVELOPMENTS IN COPYRIGHT LAW**

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## I. Introduction

In recent months, the courts have handed down several interesting and important decisions affecting the law of copyrights. In particular, the courts (both trial and appellate) have taken the opportunity to apply the teachings of the Supreme Court's revolutionary decision in *Feist Publications, Inc. v. Rural \*156 Telephone Service Co.*<sup>1</sup> In several decisions, the courts have continued to emphasize the existence of a presumption against the transfer of copyright ownership and have addressed issues of venue and jurisdiction in copyright cases. The recent cases show continued development in copyright disputes in computer software. Issues of fair use, fragmented literal similarity, and vicarious liability in a copyrighted work have also challenged the courts. Finally, several decisions illustrate the developing trends in remedies for copyright infringement.<sup>2</sup>

## II. The Subject Matter of Copyright

### A. Original Work of Authorship -- More Interpretation of the Supreme Court's *Feist* Decision

In *Bellsouth Advertising, Inc. v. Donnelly Information Publishing, Inc.*,<sup>3</sup> the court was called upon to apply the recent Supreme Court decision of *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>4</sup> to determine whether the copying of a compilation copyright registered in "Yellow Pages" classified business directory constituted copyright infringement.<sup>5</sup> Following the rationale in *Feist*, the Eleventh Circuit, sitting *en banc*, held that the district court erred by extending copyright protection to the collection of facts in the Bellsouth directory based on uncopyrightable formative acts used to generate the listings.<sup>6</sup>

The district court found that Bellsouth provided Donnelly with the names, addresses and telephone numbers of its business subscribers for publication in Donnelly's own directory. However, Donnelly not only printed its directory but also used pages of the Bellsouth directory, which had been marked with codes of each directory listing, to produce sales lead sheets with information about each Bellsouth subscriber. Bellsouth successfully sued Donnelly for copyright infringement, the district court finding that Bellsouth's compilation copyright was infringed because the encoded elements that were keyed into the database corresponded to the protectable structure, coordination, and arrangement of Bellsouth's directory.<sup>7</sup>

The Eleventh Circuit reversed, vacating an earlier panel decision affirming the district court.<sup>8</sup> The court agreed that the yellow pages at issue required more organization and arrangement than the white pages in *Feist*, but pointed out that the originality of the yellow pages compilation must be resolved by comparing the directory with other business telephone directories which dictate similar organization.<sup>9</sup> Also, the court held that Bellsouth's claim of copyright in the arrangement of its directory did not satisfy an analysis under the Merger Doctrine. The court reasoned that the expression in the directory could not be protected in instances where there were so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.<sup>10</sup> The court concluded that "by copying the name, address, telephone number, business type, and unit of advertisement purchased for each listing in the [Bellsouth] directory, Donnelly copied no original element of selection, coordination or \*157 arrangement."<sup>11</sup> "The relevant inquiry is not whether there is some imaginable, although manifestly less useful, method of arranging business telephone listings. . . . The pertinent inquiry is whether the compiler has demonstrated originality . . . in its arrangement or coordination."<sup>12</sup>

In a stinging dissent, Judge Hatchett rejected the court's rationale and charged that the decision "transform[ed] the multi-billion dollar classified publishing industry from a business requiring the production of a useful directory based on multiple layers of creative decision making, into a business requiring no more than a successful race to the data processing agency [to] copy another publisher's copyrighted work product."<sup>13</sup> Noting that the court in *Feist* stated several times that the creativity requirement was quite modest, Judge Hatchett opined that there was no reason to believe the *Feist* decision should be interpreted as a wholesale rejection of compilation copyrights with the many decisions upholding copyright in fact-based compilations. He continued that nothing in *Feist* would significantly undermine the claim of copyright protection for yellow page telephone directories, which are organized within subject matter groupings and contain varied typeface configurations along with textual and pictorial advertisements. Judge Hatchett concluded that the district court found such original coordination and arrangement, but all these findings were rejected by the *en banc* majority.<sup>14</sup>

The *en banc* court did not discuss the issue implicit in Judge Hatchett's dissent -- whether an originality determination is a determination of fact or law (or both).<sup>15</sup> The ultimate issue of whether the selection, coordination, and arrangement of the heading and listing under those headings are sufficiently creative to qualify for copyright protection when a rival publisher engages in wholesale copying, may be answered by the Supreme Court, if the court accepts Bellsouth's petition for *certiorari* filed on November 30, 1993.

### **\*158 B. Presumption Continues Against the Transfer of Copyright Ownership**

In two recent cases, courts have reiterated the position that there is a strong presumption against the conveyance of copyrights in the absence of language which expressly grants such rights. In *Corcovado Music Corp. v. Hollis Music, Inc.*,<sup>16</sup> the court reversed the district court decision,<sup>17</sup> indicating that conveyances of renewal rights of copyrights under 17 U.S.C. § 304(a)<sup>18</sup> are not favored absent specific language conveying such rights.<sup>19</sup> Even in situations where a contract exists that clearly conveys original term copyrights and does not mention future rights, that does not as a matter of law convey renewal rights.<sup>20</sup> In *Cassway v. Chelsea Historic Properties I*,<sup>21</sup> the court ruled that under 17 U.S.C. § 202,<sup>22</sup> when ownership of property embodying a copyright has been transferred by written agreement, that does not necessarily mean that ownership of the copyright has been transferred.<sup>23</sup>

## **III. Miscellaneous Issues in Copyright Litigation**

### **A. Venue is Limited to District Where Infringement Occurred**

Interpreting the copyright venue statute,<sup>24</sup> the Seventh Circuit recently held in *Milwaukee Concrete Studios v. Fjeld Manufacturing*,<sup>25</sup> a case of first impression, that venue for a copyright infringement suit under the statute lies in the particular judicial district where the defendant has contacts and not in any judicial district throughout the state.<sup>26</sup>

In *Milwaukee Concrete*, Milwaukee Concrete Studios (MCS) sued Greely Ornamental Concrete Products (Greely) and Fjeld Manufacturing (Fjeld) in the Eastern District of Wisconsin. MCS manufactures concrete statuary, including its “Oakwood Squirrel Birdbath,” the subject matter of the present suit. In its complaint, MCS alleged that Fjeld infringed MCS’s copyrighted bird baths by importing unauthorized copies from Canada to Greely so that Greely could make a mold of the bird bath.<sup>27</sup> Greely’s offices are located in the Western District of Wisconsin.<sup>28</sup>

Fjeld moved to dismiss the complaint for improper venue. MCS argued that venue in the Eastern District of Wisconsin was proper under 28 U.S.C. § 1400(a), which provides that copyright infringement suits may be brought “in the district in which the defendant or his agent resides or may be found.”<sup>29</sup> Both parties agreed that because Fjeld resided in North Dakota, venue would lie in the Eastern District \*159 of Wisconsin only if Fjeld “may be found” there.<sup>30</sup> Fjeld argued that it could not be “found” in the Eastern District because it had no contacts there. MCS argued that Fjeld could be found there for purposes of 28 U.S.C. § 1400(a) because it was subject to personal jurisdiction there under the Wisconsin long-arm statute. The district court found venue improper.<sup>31</sup>

The district court agreed with MCS that the “may be found” requirement of 28 U.S.C. § 1400(a) generally is equated with personal jurisdiction, but that amenability to personal jurisdiction must relate to the district in which the action was commenced.<sup>32</sup> According to the district court, “state” in the long-arm statute is substituted with “district” in order to preserve the meaning of 28 U.S.C. § 1400(a).<sup>33</sup> Because the relevant conduct occurred at Greely’s place of business in the Western District, that district court held that no act of copyright infringement occurred in the Eastern District.<sup>34</sup> The Seventh Circuit agreed.<sup>35</sup> The court acknowledged that 28 U.S.C. § 1400(a) itself requires that a defendant be found in a particular judicial district, rather than in a state in which the district court sits, thus rejecting MCS’s argument that the statute’s may be found provision should be equated with amenability to personal jurisdiction under a state long arm statute, which would allow Fjeld to be found in any federal judicial district within the state.<sup>36</sup>

The court reasoned that:

Although we rely on the tools of personal jurisdiction -- namely, state long-arm statutes -- to determine where defendant “may be found,” we must do so in a way that is meaningful to the venue analysis, for section 1400(a) is concerned solely with venue and not personal jurisdiction. The section 1400(a) inquiry must therefore focus on contacts with the particular federal judicial district in which the copyright action has been filed. It is not sufficient that Fjeld would be subject to personal jurisdiction under the Wisconsin long-arm statute by virtue of contacts with another district in that state.<sup>37</sup>

According to the court, because Fjeld had no contacts with the Eastern District that would be sufficient to confer personal jurisdiction under the Wisconsin long arm statute, it was not found there for purposes of 28 U.S.C. § 1400(a).<sup>38</sup>

### **B. “Arising Under” Copyright Jurisdiction Exists in Dispute Concerning Oral Transfer of Copyrighted Designs**

In *Sullivan v. Naturalis, Inc.*,<sup>39</sup> the court held that a dispute concerning the oral transfer of rights in copyrighted designs for a retail store arises under the Copyright Act for purposes of federal subject matter jurisdiction, because resolving the dispute will require interpreting the provisions of the Act that requires transfers of rights to be in writing.<sup>40</sup>

The Sullivans created copyrighted designs for the creation of a retail store called “Naturalis.” The owners of the Naturalis store paid for the designs, and orally promised to complete payment when the \*160 store opened.<sup>41</sup> No further payments were made when the store opened in 1991. The Sullivans filed suit against Naturalis and its owners alleging copyright infringement. The district court dismissed the case for lack of subject matter jurisdiction, holding that the underlying issue was a claim for breach of contract, not copyright infringement.<sup>42</sup>

On appeal, the Sullivans argued that the subject matter jurisdiction existed because they were seeking remedies granted by the Copyright Act and because adjudication of their claim necessarily required construction of the Act.<sup>43</sup> Specifically, the Sullivans contended that the court must interpret 17 U.S.C. § 204,<sup>44</sup> as requiring that transfers be in writing, because the parties entered into an oral or implied agreement concerning the transfer of her rights in the Naturalis concept.<sup>45</sup> The Eleventh Circuit agreed with Sullivan, citing several cases where courts have found federal subject matter jurisdiction to exist where application and interpretation of the Copyright Act would be necessary to resolve the plaintiffs’ claims.<sup>46</sup> In Footnote 5, the court noted that it could only look at the allegations and the amended complaint to decide whether jurisdiction exists, because the district court conducted no discovery before dismissing the case.<sup>47</sup>

## IV. Infringement

### A. The Abstraction-Filtration-Comparison Test for Infringement of Computer Programs

Software disputes also continue to challenge the courts. In *Gates Rubber Co. v. Bando American Industries*,<sup>48</sup> the Tenth Circuit affirmed the grant of a preliminary injunction by a district court that employed a multi-step infringement test to compare two computer programs for infringing similarities. The test, adopted from the one used in *Autoskill v. National Educational Support Systems, Inc.*,<sup>49</sup> uses three steps -- an “abstraction” step to identify unprotectable ideas, a “filtration” step to remove unprotectable ideas and other non-protectable elements, and a “comparison” step to compare the protectable expression that remains after filtration.<sup>50</sup> The Tenth Circuit reversed the district court’s finding that items critical to the copyrighted computer program are protectable, and remanded for the district court to consider whether remaining copy protectable elements “are such a substantial part” of the program that their misappropriation constitutes copyright infringement.<sup>51</sup>

Gates Rubber, an industrial belt manufacturer, owned a copyright registration for a computer program designed to aid in the selection of replacement belts.<sup>52</sup> Bando American, a competitor of Gates began to sell its “chauffeur” program which is similar to the Gates software. Gates filed suit against Bando, alleging, *inter alia*, copyright infringement of its program. After using expert testimony to determine that the programs were substantially similar, the district court entered a permanent \*161 injunction.<sup>53</sup> Concluding that the unprotectable elements of a copyrighted computer program were not sufficiently filtered out by the district court in its finding of infringement, the Tenth Circuit reversed.<sup>54</sup>

In its reasoning, the court reviewed the proper analysis for ascertaining substantial similarity in copyright infringement. The court agreed with the district court that legally sufficient facts in the technologically complex area of computer programming must be ascertained with expert testimony.<sup>55</sup> Once these facts are gathered, the court can then analyze which portions of the program infringe protected expression:

We acknowledge that unprotectable elements of a program, even if copied verbatim, cannot serve as the basis for ultimate liability for copyright infringement. However, the copying of even unprotected elements can have a probative value in determining whether the defendant copied the plaintiff’s work. Where a court first extracts all unprotected elements of a work, and only compares protected elements, it deprives itself of the use of probative, and potentially essential, information on the factual issue of copying. That is because, even if the court finds protectable elements of a program to be similar, it still must determine whether those elements were copied from the plaintiff’s work, whether the duplication can be attributed to other factors, or whether its reproduction was pure chance. The fact that nonprotectable elements of the original program were also copied, although it cannot be the basis for liability, can be probative of whether protected elements were copied. That is, because in certain situations, it may be more likely that protected elements were copied if there is evidence of copying among the unprotected elements of the program.<sup>56</sup>

Although the court adopted the abstraction-filtration-comparison test which it had previously set out in *Autoskill* in footnote 12, the court qualified its endorsement by observing that “the appropriate test to be applied in the order in which its various

components are to be applied in any particular case may vary depending on the claims involved, the procedural posture of the suit, and the nature of the computer programs at issue.”<sup>57</sup>

### ***B. Infringement Based On Fragmented Literal Similarity Is Still Infringement***

In *Jarvis v. A&M Records*,<sup>58</sup> the court held that defendants’ songs, which contained verbatim copies of small parts of plaintiff Boyd Jarvis’ copyrighted song, “The Music’s Got Me” infringed the copyright because the value of plaintiffs’ work may be substantially diminished even when only a part is copied, if that part is of great qualitative importance to the work as a whole.<sup>59</sup> Defendants are the artists and record company holding rights in the song “Get Dumb (Free Your Body).”<sup>60</sup> On motion for summary judgment, the defendants argued that because the listening public would not take defendants’ song for plaintiff’s, that infringement should not lie.<sup>61</sup>

If it really were true that for infringement to follow a listener must have to confuse one work for the other, a work could be immune from infringement so long as the infringing work reaches a substantially different audience than \*162 the infringed work. In such a situation, a rap song, for instance, could never be held to have infringed an easy listening song or a pop song.<sup>62</sup>

The court also rejected the defendants’ arguments that “oohs,” “moves,” and “free your body” were phrases usually not copyrightable, stating that it is unfair to characterize such phrases as clichés typical in the field, because the phrases were used together in a particular arrangement and in the context of a particular melody.<sup>63</sup> The precise relationship of the phrases *vis a vis* each other was copied by defendants. Thus, according to the court, there was no question that the combined phrase “Ooh ooh ooh ooh . . . move . . . free your body” is an expression of an idea that is copyrightable.<sup>64</sup>

### ***C. Contributory Infringement or Vicarious Liability***

On theories of contributory infringement or vicarious liability, a defendant in a copyright action may be jointly and severally liable for the infringing conduct of another.<sup>65</sup> Normally, on vicarious liability theories, a corporate officer may be liable if the officer has a financial stake in the infringing activity and if the officer has the ability and right to supervise the activity causing the infringement.<sup>66</sup> In at least two recent cases, courts have shed additional light on this issue. *See Realsongs v. Gulf Broadcasting Corp.*,<sup>67</sup> and *Songmaker v. Forward of Kansas, Inc.*<sup>68</sup>

### ***D. Trends in Fair Use of a Copyrighted Work***

The Fair Use Doctrine, embodied in 17 U.S.C. § 107<sup>69</sup> has been the subject of numerous issues in cases in the last few months.<sup>70</sup> The most attention in the fair use area has been in what is popularly known as the “Pretty Woman” case which was recently argued before the Supreme Court and is pending decision.<sup>71</sup> Acuff-Rose Music, Inc. owns the copyright to Roy Orbison’s 1964 hit song “Oh, Pretty Woman” and has received substantial income from the song and from the licensing of derivative works. The rap group, 2 Live Crew, wrote and recorded a satirical version of the song called “Pretty Woman” and sought a license from Acuff-Rose, which was denied. The Sixth Circuit reversed the district court’s finding of fair use because of what it termed the “blatantly commercial purpose” of the parody.<sup>72</sup> 2 \*163 Live Crew filed a petition for certiorari with the Supreme Court. The Court granted review limited to the question whether 2 Live Crew’s commercial parody was a “fair use” within the meaning of § 107.<sup>73</sup>

During the argument, counsel for 2 Live Crew argued that the copyright system is intended to encourage creativity, including parodies. He argued that a parody of a copyrighted work, or the use of a copyrighted work to parody society, should be considered a fair use under § 107 unless it supplants the market for the original work.<sup>74</sup> According to the report, all the Justices appeared interested in the arguments based on the questions asked; the much anticipated decision is expected to provide fundamental analysis to the area of fair use.

In another case,<sup>75</sup> the U.S. District Court for the District of Massachusetts held that a textbook publisher’s version of a copyrighted measurement was a fair use<sup>76</sup> because it resulted in some additional educational benefit and did not supersede the use of the original work.<sup>77</sup> Rubin, a professor of psychology, is the creator of the “Love Scale,” a psychological questionnaire instrument designed to elicit and rate one’s feeling toward another person.<sup>78</sup> The Love Scale has appeared in many publications, has been used widely in psychological research, and is considered by many psychologists to be an important scientific work, according to the court.<sup>79</sup> Rubin has also collected substantial royalties for authorized use of the Love Scale.<sup>80</sup>

Brooks/Cole Publishing copied the Love Scale and published the instrument in its *Social Psychology* periodical, attributing authorship and work to Mr. Rubin.<sup>81</sup> Rubin filed suit for copyright infringement against Brooks/Cole which answered that its copying constituted fair use under § 107.<sup>82</sup>

After analyzing the various factors under § 107, the court agreed with Brooks/Cole and held that the reproduction of the Love Scale was a fair use<sup>83</sup> because it resulted in some educational benefit and did not supersede the use of the original work.<sup>84</sup> However, the court held that any future use of the work will not be considered fair use<sup>85</sup> because of the potential harm to the copyright owner's market created by the very fact of the court's fair use ruling.<sup>86</sup>

**\*164 E. The Interpretation of "Further Transmitted" as Exempted From Infringement Under 17 U.S.C. § 110(5)**

17 U.S.C. § 110(5) shelters the "communication of a transmission" from a radio or television set "of a kind commonly used in private homes."<sup>87</sup> Absent this exemption, it would be an infringing public performance for a doctor, barber, or bartender to have copyrighted or dramatic programming emanating from a radio or television set placed in a waiting room, shop or tavern. Cases have held that the exemption is lost however, if a "direct charge is made to see or hear the transmission,"<sup>88</sup> or if the transmission "is further transmitted to the public."<sup>89</sup>

In *Cass County Music Co. v. Muedini*,<sup>90</sup> the court considered whether the owner of a small family restaurant in Racine, Wisconsin was liable for copyright infringement because dining patrons heard radio music "through nine 8" speakers installed in the ceiling of the public portion of the restaurant.<sup>91</sup> The court ruled that the radio station had already presumably paid a "licensing fee to play its music," and that a small family restaurant "should not have to add to that royalty" in order to play the radio in its restaurant.<sup>92</sup> It is interesting to note that defendant faced a default judgment for failing to answer the complaint and the judge still ruled in its favor.<sup>93</sup>

The court in *Profit Music, Inc. v. Shamla Oil Co., Inc.*,<sup>94</sup> reached a different conclusion. Defendants operated a Unocal 76 Holiday Express service station on a highway in Silver Lake, Minnesota, and received broadcasts *via* a radio receiver in the station, then sent the signal to its customers via a device which connected defendants' radio receiver to their incoming telephone lines.<sup>95</sup> The court ruled that such transmission is "further transmitted to the public" and thus § 110(5) provides no shelter for infringement.<sup>96</sup>

## **V. Developments in Remedies for Copyright Infringement**

### **A. Seizures and Other Extraordinary Relief**

Under the copyright laws, a copyright owner may seek to impound infringing material under 17 U.S.C. § 503(a).<sup>97</sup> The copyright rules, adopted in 1909, clearly provided for "summary seizure and impounding" simply by filing an affidavit describing the allegedly infringing materials and their locations and posting a bond approved by the court.<sup>98</sup> However, because of the extraordinary nature of this form of relief, Congress implicitly recognized that preliminary impoundment could violate a defendant's rights under the United States Constitution and thus provided safeguards for leaving the ultimate question up \*165 to the discretion of the district court.<sup>99</sup> The inherent conflict between the copyright rules and discretionary statutes was addressed recently by the courts.

The court in *Paramount Pictures Corp. v. Doe*,<sup>100</sup> ruled that the mandatory provisions of the old copyright rules are clearly inconsistent with the discretionary powers conferred on district courts by the Copyright Act of 1976.<sup>101</sup> The court held that although plaintiffs satisfied the old copyright rules and that the court could fashion constitutionally valid methods of impoundment in appropriate cases, "the plaintiffs in these actions have not supported sufficiently their claims that the order of seizure is essential to the protection of their interest."<sup>102</sup> The defendants in these actions were owners and operators of a video rental business, and were accused of taping and selling video copies of various motion pictures owned by Paramount Pictures.<sup>103</sup> Plaintiffs evidently made no showing to support their conclusory allegations that the defendants were "savvy film pirates" or that a seizure order was essential to providing any meaningful relief. The court found that a temporary restraining order would be more than enough to suffice in the present case.<sup>104</sup>

The court also found that plaintiffs' attempt at seizure was offensive to the Fourth Amendment of the United States Constitution.<sup>105</sup> Paramount Pictures' proposed seizure order did not specify with particularity the premises to be searched or the articles to be seized. Moreover, the order was overly broad, permitting Paramount Pictures not only to seize infringing video cassettes and the machines used to produce them at the defendants' places of business, but also to seize such materials at any location where defendants or their agents may be found. The court was offended by what it termed "a roving warrant."<sup>106</sup> Thus, this case is instructional to those copyright owners that choose to use such extraordinary relief to protect their interests.

It is undisputed that district courts have ultimate discretion in fashioning an appropriate remedy for copyright infringement.<sup>107</sup> In cases where a district court grants a preliminary injunction to a copyright owner, it may also issue a recall order. For example, in *Gund, Inc. v. Golden Bear Co., Ltd.*,<sup>108</sup> the court issued a recall order for infringing Gund's copyrighted stuffed toy dog. The court found that recall was the only effective remedy in this case, given that all the toys were sold to, and in the possession of K-Mart, which was not a party to the action. Partly concerned that rescinding the recall order might encourage other infringers to distribute their products quickly and widely and then defend against a possible recall on the grounds of economic injury, the court found that Gund had established a prima facie case of infringement, and that a recall order would not be unduly burdensome for Golden Bear even though the dogs had been widely distributed throughout the K-Mart stores.<sup>109</sup>

### **\*166 B. Developments In Damages**

Perhaps the most intricate, and most important, remedial section of the copyright statute is section 504,<sup>110</sup> which spells out in detail the circumstances under which damages and profits may be awarded to a copyright owner. The act provides for the reward of either *actual* damages and any additional profits, or what are known as *statutory* damages.<sup>111</sup>

#### **1. Actual Damages Under § 504(b)<sup>112</sup>--**

By its plain language, the principal purpose of the actual damage statutory provision is to avoid double counting in the computation of monetary remedies.<sup>113</sup> According to the statute the copyright owner is entitled to the *greater* of (1) its own actual damages and (2) the infringer's profits. As stated in the case of *Respect, Inc. v. Committee on the Status of Women*,<sup>114</sup> § 504(b) evidences "a corrective measure to overturn the line of some prior case law authority that had granted copyright owners the *sum* of their actual damages plus the infringer's profits."<sup>115</sup>

In *Respect*, the court further elaborated on the idea that the copyright owner is always entitled to an accounting of the infringer's profits:

There is of course only one way to determine which of the two numbers is larger, and that is to ascertain *both* of those numbers. Hence the necessary corollary of Section 504(b) formulation -- which applies when ever the copyright owner does not claim statutory damages -- is that the owner is entitled to an accounting of the infringer's profits.<sup>116</sup>

Once the court separates out the defendant's profits, it is at least as difficult to determine which of these profits "are attributable to the infringement" under § 504(b).<sup>117</sup> The law provides that all the plaintiff need to prove is the defendants' gross profits derived from the enterprise of which the infringement is a part; the burden then shifts to the defendant to reduce the award of profits, which can be done in two different ways. The defendant can show that its profits were derived from elements of its activities other than the infringement. The defendant can also show -- whether or not its gross profits were attributable to non-infringing elements -- that its venture in fact was so costly as to eliminate most or all of the profits.<sup>118</sup> Thus, the defendant may be able to prove that its costs were so high as to totally absorb any gross profit receipts. At least one recent case exemplifies the difficulty defendants sometimes have in providing these proofs.

**\*167** In *Data General Corp. v. Grumman Systems Support Corp.*,<sup>119</sup> Data General sued Grumman for, *inter alia*, copyright infringement of Data General's computer software. Following what the court considered a "vigorously litigated trial spanning more than nine weeks,"<sup>120</sup> the jury returned a verdict against Grumman and awarded Data General \$27,417,000 on its copyright claim.<sup>121</sup> Grumman motioned the court to set aside the verdict and grant a new trial because the damages awarded by the jury were "speculative and excessive."<sup>122</sup> It argued that the copyright in the diagnostic software at issue in this case was not used at every customer site, nor at every service call, but that all such sites or service calls were included in the plaintiff's damage analysis, which the jury adopted. The Judge rejected this argument, citing evidence that Grumman's management, service technicians and customers thought Grumman could not compete effectively without using the plaintiff's copyrighted diagnostic software.<sup>123</sup>

Another recent district court case, *Jarvis v. A&M Records*,<sup>124</sup> shows the troubles plaintiffs sometimes fall into in proving actual damages. In that case, Boyd Jarvis sued A&M Records for copyright infringement of his song entitled "The Music's Got Me". A&M Records digitally sampled sections of Mr. Jarvis' song creating the actual pieces of "The Music's Got Me" throughout the defendants songs.<sup>125</sup> Although Jarvis alleged that he had been damaged by 15 million dollars, he never set forth enough evidence to establish any actual, quantifiable damages, according to the court. *Id.* at 1820. Jarvis also argued that the damages included lost opportunities,<sup>126</sup> but the court found no evidence to support such a claim.<sup>127</sup>

Defendants, on the other hand motioned for summary judgment,<sup>128</sup> alleging that the damages amounted to substantially less than defendants' profits of approximately \$350,000 because of expenses related to the infringing work.<sup>129</sup> The court found that defendants' profits, after deducting only those expenses clearly allowable as a matter of law were approximately \$96,000. The court then set out to apportion those damages so that plaintiff received only those profits clearly related to the infringing work.<sup>130</sup> Defendants proposed that the profits it made in its infringing song should be reduced 50% because at least half of the profits were due to a rap section in the song separate from the copied section. Defendants also argued that since only 12% of its song contains Jarvis' material, an additional 88% of the remaining profits should be deducted. Further, defendants stated that since there were three other songs on the record, only a quarter of the remaining profits are attributable to the infringing elements. Lastly, the defendants argued that the remaining profits, if any, must be halved again because plaintiff doesn't own the copyright of the sound recording and since the sound recording and the copyright of musical composition are identical, profits must be apportioned accordingly.<sup>131</sup> The court rejected this \*168 analysis out of hand, because there was no objective evidence relating to the fairness of attributing profits on a time or space basis or any of the other methods suggested by defendants.<sup>132</sup>

## 2. Statutory Damages Under § 504(c)<sup>133</sup>--

As an alternative to an award of actual damages and profits, section 504(c)(1) gives a plaintiff the right to "elect, at any time before final judgment is rendered, to recover. . . an award of statutory damages for all infringements involved in the action, with respect to any one work. . . in a sum of not less than \$500.00 or more than \$20,000 as the court considers just." Such an award is referred to as "statutory damages".<sup>134</sup> A number of cases this year have addressed statutory damages.

In the case of *Twin Peaks Productions, Inc. v. Publications International Ltd.*,<sup>135</sup> the court made clear that the "election" clause in section 504(c)(1) does not continue through appeal:

In this case, TPP made its choice before final judgment, apparently believing that the statutory award of \$120,000 was more likely to be sustained on appeal than the actual damage award of \$125,000. We do not think the election continues into the appellate stage. Once a plaintiff has elected statutory damages, it has given up the right to seek actual damages and may not renew that right on appeal by cross appealing to seek an increase in the actual damages.<sup>136</sup>

In that same case, the Second Circuit addressed the judicial interpretation that the general statutory range of \$500 to \$20,000 applies not to each infringement, but rather to each work infringed by the defendant, regardless of the number of infringements. In *Twin Peaks*, eight teleplays for *Twin Peaks* were at issue, all of which represented a current television program in which one or more plots continue from one episode to another.<sup>137</sup> The defendant argued that under the doctrine of *Robert Stigwood Group Ltd. v. O'Riley*,<sup>138</sup> overlapping copyrights on substantial parts of the entire work such as this would support only a single award.<sup>139</sup> The Second Circuit rejected the rule in *Stigwood* concerning overlapping, because:

We think it has no application to separately written teleplays prepared to become episodes of a weekly television series. The author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewers' interest without furnishing a resolution. We might well have a different situation if a book written as a single work was then adapted for television as a group of episodes. . . .<sup>140</sup>

\*169 Additionally, the question of whether any party to a copyright infringement action has a right to a jury trial where only the monetary damages are statutory damages under Section 504(c)<sup>141</sup> was recently addressed by the American Bar Association, Section of Intellectual Property Law in its 1992-1993 Annual Report. The Section Proposed Joint Resolution 301-1 and 301-2 stated as follows:

Resolved, that the section of Patent, Trademark and Copyright Law favors in principle the position adopted by a majority of the courts in holding that when a plaintiff's demand for monetary relief in a copyright infringement action is limited prior to the commencement of trial to the equitable remedy of statutory damages under Section 504(c) of the Copyright Act of 1976, neither party is entitled to a jury trial on any issue.<sup>142</sup>

## 3. Costs And Attorney's Fees Under § 505<sup>143</sup>--

As a final element of compensatory relief, a court has the discretion, under section 505, to award costs of either party and to

award a reasonable attorney's fee to the prevailing party.<sup>144</sup> Although there is disagreement among the courts as to whether prevailing plaintiffs should be awarded attorney's fees more readily than prevailing defendants, several courts have shed light on this developing area of copyright remedies.<sup>145</sup>

In *Twin Peaks*, the Second Circuit affirmed in part the district court decision awarding plaintiff over \$130,000 in attorney's fees -- more than the amount of actual damages in the case.<sup>146</sup> The district court had awarded fees for work done before that court and also a companion case in the Northern District of Illinois.<sup>147</sup> Although acknowledging that "the award of fees for the Illinois action is somewhat unusual",<sup>148</sup> the court found that the district court's award was proper in part because the general standard for awarding fees is very favorable for prevailing parties, generally being "awarded to a prevailing plaintiff."<sup>149</sup>

\*170 The court in *Playboy Enterprises, Inc. v. Dumas*<sup>150</sup> acknowledged that § 505 has been applied differently with regard to plaintiffs and defendants. "Plaintiffs who prevail are awarded fees as a matter of course. Defendants on the other hand, will recover if 'plaintiff's claims are objectively without arguable merit' or 'baseless, frivolous, unreasonable or brought in bad faith.'"<sup>151</sup> It is interesting to note that the court ultimately rejected any attorney's fees with respect to the work made for hire issue, a question of first impression with regard to retroactive writings, and awarded fees for only the infringement issues and recognized that "this award of fees should be relatively minor, as it relates only to the preparation of Dumas' attorneys with regard to the infringement counterclaim."<sup>152</sup>

As previously reported, the Ninth Circuit has adopted a similar rule with respect to prevailing defendants in a copyright action:

This circuit has adopted the rule that in litigation brought under the Copyright Act a prevailing defendant may not be awarded attorneys' fees under § 505 unless it can be demonstrated that the action was frivolous or was instituted and prosecuted in bad faith. The purpose of that rule is to avoid chilling a copyright holder's incentive to sue on colorable claims, and thereby to give full affect to the broad protection for copyrights intended by the Copyright Act.<sup>153</sup>

Fogerty subsequently filed a petition for *certiorari* to the Supreme Court, which was granted on June 21, 1993. After prevailing on the merits, but not on the award of fees,<sup>154</sup> defendant Fogerty argued in its petition that prevailing plaintiffs and prevailing defendants should both be routinely awarded their attorney's fees under § 505 of the Copyright Act absent exceptional circumstances (the "British Rule").<sup>155</sup> He argued that there is no rational policy for distinguishing between plaintiffs and defendants in copyright action, and that the express language in § 505 authorizes district courts to award attorney's fees to the "prevailing party."<sup>156</sup> Hewlett Packard Company (HP) filed an amicus brief in support of petitioner, having been a prevailing defendant in a suit related to graphical user interfaces for personal computers, but also having been denied its fees.<sup>157</sup> HP wrote in its brief that "a very real danger" exists that plaintiffs will improperly attempt to obtain copyright protection for subject matter that should be judged under the very different standards of patent law.<sup>158</sup>

On March 1st, 1994, the Supreme Court held that:

Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. "There is no precise rule or formula for making these determinations," but instead equitable discretion should be exercised "in light of the conditions we have identified." *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983).<sup>159</sup>

#### Footnotes

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<sup>1</sup> 111 S. Ct. 1282 (1991).

<sup>2</sup> This article reports selected recent copyright decisions reported in 27 -- 28 U.S.P.Q.2d.

<sup>3</sup> 999 F.2d 1436, 28 U.S.P.Q.2d (BNA) 1001 (11th Cir. 1993), *cert denied*, 114 S. Ct. 943 (1994).

<sup>4</sup> *Feist Publications*, 111 S. Ct. 1282 (1991).

5 *Bellsouth*, 999 F.2d at 1438.

6 *Id.* at 1441.

7 *Id.* at 1439.

8 *Id.* at 1439 n.6.

9 *Id.* at 1442 n.13.

10 *Id.* at 1442.

11 *Id.* at 1446.

12 *Id.* at 1444.

13 *Id.* at 1471.

14 *Id.* at 1439 n.6.

15 The Second Circuit apparently views the originality determination as more fact-related. In *Kregos v. Associated Press*, 937 F.2d 700, 19 U.S.P.Q.2d (BNA) 1161 (2d Cir. 1991), the court held that originality and creativity of a compilation of baseball pitching statistics should not have been determined a summary judgment in view of the variety of other published pitching forms. The decision noted that much of the similarity between Kregos and AP's form is necessitated by the limited number of statistics considered outcome predictive by those familiar with baseball.

*See also MidAmerica Title v. Kirk*, 991 F.2d 417, 26 U.S.P.Q.2d (BNA) 1538, 1541 (7th Cir. 1993) (reversing district court's decision to dismiss copyright infringement claim for failure to state a claim based on the specific elements of originality of plaintiffs compilation title commitment reports that allegedly had been infringed. The court held that such arguments were more proper at the summary judgment level and that the Supreme Court's decision in *Feist* did not require additional detail regarding the element of copyrightable originality in a compilation claim.).

In *Shepler's Catalog Sales, Inc. v. Old West Dry Goods Corp.*, 830 F. Supp. 566, 28 U.S.P.Q.2d (BNA) 1555 (D. Kan. 1993), the court reached the opposite conclusion. Defendants moved to dismiss for failure to state a claim of copyright infringement of plaintiff's order form and ordering information in one of defendants' mail order western wear catalogs. Old West argued that the order form and ordering information are not copyrightable pursuant to the rule known as the "blank form doctrine." *See* 37 C.F.R. § 202.1(c) (1992). After considering the several cases relating to blank forms and the Supreme Court's decision in *Feist*, the court concluded that plaintiffs' ordering information consisted of simple instructions on how to mail in an order, shipping information, and instructions on ordering a gift certificate or obtaining a refund which could be found in any other mail order catalog printed. Accordingly, the court found that despite the Supreme Court's acknowledgement that the amount of creativity necessary to warrant originality is low, the plaintiffs' ordering form and ordering information on their face were not the type of expression entitled to copyright protection and thus dismissed that claim. *Shepler's*, 830 F. Supp. at 570.

16 981 F.2d 679, 26 U.S.P.Q.2d (BNA) 1632 (2d Cir. 1993).

17 *Corcovado*, 981 F.2d at 680.

18 17 U.S.C. § 304(a) (Supp. 1992).

19 *Corcovado*, 981 F.2d at 684.

20 *Id.*

21 26 U.S.P.Q.2d (BNA) 1791 (E.D. Pa. 1993).

22 17 U.S.C. § 202 (Supp. 1992).

23 *Cassway*, 26 U.S.P.Q.2d (BNA) at 1794.

24 The copyright venue statute, 28 U.S.C. § 1400(a), provides:  
Civil actions, suits, or proceedings arising under any act of Congress relating to copyrights or exclusive rights in mask works may  
be instituted in the district in which the defendant or his agent resides or may be found.

25 8 F.3d 441, 28 U.S.P.Q.2d (BNA) 1594 (7th Cir. 1993).

26 *Milwaukee Concrete*, 8 F.3d at 445.

27 *Id.* at 443.

28 *Id.* at 444.

29 *Id.* at 443.

30 *Id.*

31 *Id.* at 444.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 448.

36 *Id.* at 446.

37 *Id.*

38 *Id.* at 448.

39 5 F.3d 1410, 28 U.S.P.Q.2d (BNA) 1618 (11th Cir. 1993).

40 *Sullivan*, 5 F.3d at 1411.

41 *Id.* at 1411-12.

42 *Id.* at 1412.

43 *Id.*

44 17 U.S.C. § 204 (Supp. 1992).

45 *Sullivan*, 5 F.3d at 1412.

46 *Id.* at 1412-13.

47 *Id.* at 1413 n.5.

48 9 F.3d 823, 28 U.S.P.Q.2d (BNA) at 1505 (10th Cir. 1993).

49 994 F.2d 1476, 26 U.S.P.Q.2d (BNA) 1828 (10th Cir. 1993).

50 *Gates Rubber*, 9 F.3d at 834.

51 *Id.* at 830.

52 *Id.* at 830.

53 *Id.* at 831.

54 *Id.* at 830.

55 *Id.* at 834-35.

56 *Id.* at 832 n.7.

57 *Gates Rubber Co.*, 9 F.3d at 834 n.12, 28 U.S.P.Q.2d (BNA) at 1508 n.12.

58 827 F. Supp. 282, 27 U.S.P.Q.2d (BNA) 1812 (D.N.J. 1993).

59 *Jarvis*, 827 F. Supp at 290 (However, the Court did not hold that the defendant's songs were infringed, but simply denied defendants' motion for summary judgement.).

60 *Id.* at 286.

61 *Id.* at 290.

62 *Id.*

63 *Id.* at 292.

64 *Id.*

65 *Realsongs v. Gulf Broadcasting Corp.*, 824 F. Supp. 89, 91, 28 U.S.P.Q.2d (BNA) 1071, 1073 (M.D. La. 1993).

66 *Id.*

67 824 F. Supp 89.

68 27 U.S.P.Q.2d (BNA) 1788 (D. Kan. 1993).

69 17 U.S.C. § 107 (Supp. 1992).

70 Section 107 provides that:

In determining whether the use made of a work in a particular case is a fair use the factors to be considered shall include --

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

71 *See Campbell v. Acuff-Rose Music, Inc., cert granted in part* 113 S. Ct. 1642 (1993).

72 *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 23 U.S.P.Q.2d (BNA) 1817 (6th Cir. 1992).

73 *Campbell*, 113 S. Ct. 1642.

74 *See* 47 PAT. TRADEMARK & COPYRIGHT J. (BNA) at 28-30 (November 11, 1993).

75 *Rubin v. Brooks/Cole Publishing Co.*, 836 F. Supp. 909, 29 U.S.P.Q.2d (BNA) 1335 (D. Mass. 1993).

76 *Rubin*, 836 F. Supp. at 922.

77 *Id.* at 916-17.

78 *Id.* at 913.

79 *Id.* at 914.

80 *Id.* at 913.

81 *Id.* at 914-15.

82 *Id.* at 915.

83 *Id.* at 922.

84 *Id.* at 916-17.

85 *Id.* at 922.

86 For other recent cases addressing the fair use issue, see *United Feature Syndicate, Inc. v. Coons*, 817 F. Supp. 370, 376-81, 28 U.S.P.Q.2d (BNA) 1401, 1407-11 (S.D.N.Y. 1993) (holding that defendants' production of four identical sculptures entitled "Wild Boy and Puppy" which contained identical copies of the Garfield comic strip character "Odie," is not fair use because defendants' use was of commercial nature and the sculpture cannot qualify as a parody since it is at best a parody of society at large rather than a parody of "Odie."); *Norse v. Henry Holt & Co.*, 991 F.2d 563, 566, 26 U.S.P.Q.2d (BNA) 1468, 1470 (9th Cir. 1993) (holding that the district court erred in granting appellee summary judgment on the ground that the two works were not substantially similar without findings relating to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" under 17 U.S.C. § 107(3)).

87 17 U.S.C. § 110(5) (Supp. 1992).

88 17 U.S.C. § 110(5)(A) (Supp. 1992).

89 17 U.S.C. § 110(5)(B) (Supp. 1992).

90 821 F. Supp. 1278, 26 U.S.P.Q.2d (BNA) 1955 (E.D. Wis. 1993).

91 *Cass County*, 821 F. Supp. at 1278.

92 *Id.* at 1282.

93 *Id.* at 1279.

94 26 U.S.P.Q.2d (BNA) 1554 (D. Minn. 1993).

95 *Id.* at 1555.

96 *Id.* at 1556.

97 17 U.S.C. § 503(a) (Supp. 1992).

98 *See* Copyright Rules, 17 U.S.C. foll. § 501, and 17 U.S.C. § 503(a) (Supp. 1992).

99 17 U.S.C. § 501(b) (Supp. 1992).

100 821 F. Supp. 82, 27 U.S.P.Q.2d (BNA) 1594 (E.D.N.Y. 1993).

101 *Paramount Pictures*, 821 F. Supp. at 87.

102 *Id.* at 89.

103 *Id.* at 84.

104 *Id.* at 89.

105 *Id.* at 90.

106 *Id.* at 91.

107 *See id.* at 87 n.4.

108 27 U.S.P.Q.2d (BNA) 1549 (S.D.N.Y. 1992).

109 *Id.* at 1553.

110 17 U.S.C. § 504 (Supp. 1992).

111 *Id.*

112 *Id.*

113 Section 504(b) spells out the rights of a copyright owner who has been the victim of a infringement:  
The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

114 26 U.S.P.Q.2d (BNA) 1846, 1857 (N.D. Ill. 1993); an amended opinion which contained the same substantive language but not the specific quotations was reported at 815 F. Supp. 112.

115 *Respect*, 26 U.S.P.Q.2d (BNA) at 1857.

116 *Id.*

117 17 U.S.C. § 504(b).

118 *See* W.F. PATRY, LATMAN'S THE COPYRIGHT LAW, pp. 283-87 (6th ed. 1986).

119 825 F. Supp. 340, 28 U.S.P.Q.2d (BNA) 1481 (D. Mass. 1993).

120 *Data General*, 825 F. Supp. at 343.

121 *Id.*

122 *Id.* at 348.

123 *Id.* at 349. The court also rejected Grumman's complaint that the jury's adoption of Data General's damage model was error because Data General would not have enjoyed its historical market share of the service business at its customary prices, had Grumman not been able to secure customers through infringing its copyrighted diagnostic software. *Id.*

124 827 F. Supp. 282, 27 U.S.P.Q.2d (BNA) 1812 (D.N.J. 1993).

125 *Jarvis*, 827 F. Supp. at 286.

126 *Id.* at 293.

127 *Id.* at 294.

128 *Id.* at 282.

129 *Id.* at 294.

130 *Id.* at 295.

131 *Id.* at 296.

132 *Id.*

133 17 U.S.C. § 504(c) (Supp. 1992).

134 *Id.* Several of the court decisions herein conclude that the purpose of statutory-damage remedy is largely deterrent; it also provides a vindication of the copyright owner's interest when litigation would otherwise appear largely futile even though just.

135 996 F.2d 1336, 27 U.S.P.Q.2d (BNA) 1001, 1011 (2d Cir. 1993).

136 *Twin Peaks Productions*, 996 F.2d at 1380.

137 *Id.* at 1381.

138 530 F.2d 1096, 1104 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976).

139 *Twin Peaks Productions*, 996 F.2d at 1381.

140 *Id.* Here, the defendant, Publications International, had copied the plots of the eight teleplays in great detail for its book “Welcome to Twin Peaks: a complete guide to who’s who and what’s what”. See also *Tempo Music, Inc. v. Christianson Food and Mercantile Co.*, 806 F. Supp. 816, 820-21, 26 U.S.P.Q.2d (BNA) 1947, 1950 (D. Minn. 1992) (“[B]ased on the fact that ASCAP contacted or attempted to contact Christianson 22 times in order to persuade him to obtain a license and on all the other evidence presented, the court finds the damages should be assessed at \$1,000 per infringement, for a total statutory damage award of \$4,000. The court concludes that \$4,000 in damages, combined with the assessment of costs and attorneys fees to Christianson, will effectuate the intent and purposes of the copyright act and provide the plaintiffs with a fair and just amount of damages.”).

141 17 U.S.C. § 504(c) (Supp. 1992).

142 Annual Report 1992-93 pages 234. The committee also proposes legislation changing Section 504(c) to codify this approach. The ABA Committees on Copyright Legislation and Federal Practice and Procedure jointly propose that the Section of Patent, Trademark and Copyright Law adopt a resolution in favor of the position that there is no right to a jury trial on any issue where statutory damages are the only monetary relief sought. They also jointly propose that the Section adopt a resolution favoring the amendment of § 504(c) to clarify that no right to a jury trial exists in such cases. *Id.*

143 17 U.S.C. § 505 (Supp. 1992).

144 *Id.*

145 It should be noted that a plaintiff is not entitled to either costs or attorneys fees if, in the case of a published work, registration for the copyright is effected until after infringement has “commenced.” The plaintiff does, however have a three month post publication grace period during which registration will protect against the sacrifice of costs and attorneys’ fees even for pre-registration infringements. See *Television Digest, Inc. v. United States Telephone Ass’n*, 28 U.S.P.Q.2d (BNA) 1697, 1701 (D.D.C. 1993) (holding that statutory damages are available for all infringements of copyrights registered within three months after the first publication of the work, 17 U.S.C. § 412).

146 *Twin Peaks Productions*, 996 F.2d at 1382-83.

147 *Publications Int’l, Ltd. v. Simon & Schuster*, 763 F. Supp. 309, 18 U.S.P.Q.2d (BNA) 1892 (N.D. Ill. 1991).

148 *Twin Peaks Productions*, 996 F.2d at 1383.

149 *Id.* The court did, however, decline to award appellate fees under § 505 of the Copyright Act, even though they acknowledged that ““An award of attorneys’ fees may be made for services rendered on appeal as well as at the trial level””. *Id.* at 1014 (citing 3 Nimmer § 14.10 [e], at 14-129). Also, in *Tempo Music*, 806 F. Supp. 816, the court awarded over \$6,000 in costs and attorney’s fees even though only \$4,000 was awarded in statutory damages. The court found that the award was adequate because the defendant knowingly infringed the plaintiffs’ copyrights and did so even after plaintiffs informed him that his actions infringed their copyrights and that they would initiate legal action if he did not cease the infringement or obtain a license. *Id.* at 821 (citations omitted).

150 831 F. Supp. 295, 28 U.S.P.Q.2d (BNA) 1561 (S.D.N.Y. 1993).

151 *Playboy Enters.*, 831 F. Supp. at 320.

152 *Id.* at 320-21. See also *Marvin Music Co. v. BHC Ltd. Partnership*, 830 F. Supp. 651, 656, 28 U.S.P.Q.2d (BNA) 1702, 1706 (D. Mass. 1993) (“[O]nce the copyright owner prevails on an infringement claim, courts generally award costs and reasonable attorney’s fees.”).

153 *Fantasy, Inc. v. Fogerty*, 27 U.S.P.Q.2d (BNA) 1039, 1045 (9th Cir. 1993).

154 *Fantasy*, 984 F.2d at 1533.

155 Petitioner's Brief, *Fogerty v. Fantasy, Inc.*, 1994 WL 57023 (U.S. March 1, 1994).

156 *Id.*

157 Amicus Curiae Brief of Hewlett Packard Company, *Fogerty v. Fantasy, Inc.*, 1994 WL 57023 (U.S. March 1, 1994).

158 *Id.* The Third and Eleventh circuits favor a more equal standard with respect to prevailing plaintiffs and defendants in copyright actions. The reason for a more even-handed approach was enunciated in the recent case of *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 233, 27 U.S.P.Q.2d (BNA) 1679, 1685 (4th Cir. 1993):  
Because we find "no indication either in statutory language or legislative history that bad faith should be a prerequisite to a fee award, we decline to" condition an award of attorney's fees under § 505 to a prevailing defendant on a finding that the plaintiff pursued copyright litigation in bad faith.

159 *Fogerty v. Fantasy, Inc.*, 1994 WL 57023, \*7 (U.S. March 1, 1994) (cite is the Court's).