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INTELLECTUAL PROPERTY—COPYRIGHT ACT—COPYRIGHT INFRINGEMENT—ATTORNEY'S FEES—The United States Supreme Court held that attorney's fees are to be awarded to the prevailing party only at the discretion of the court, and that prevailing plaintiffs and prevailing defendants should be treated the same.


In 1970, Petitioner John C. Fogerty ("Fogerty"), a successful musician and songwriter, wrote and copyrighted a song entitled "Run Through the Jungle." The exclusive publishing rights of the song were obtained by Fantasy, Inc. ("Fantasy"). In 1985, Fogerty published and copyrighted a song entitled "Old Man Down the Road," which was released and distributed by Warner Brother Records, Inc. Respondent Fantasy sued Fogerty and Warner Brother Records, Inc. in federal district court for copyright infringement, alleging that Fogerty's new song, "The Old Man Down the Road," was musically identical to that of "Run Through the Jungle." After a jury trial, a verdict in favor of Fogerty was returned. Fogerty then moved for an award of

1. John Fogerty was the lead singer and songwriter of the group "Creedence Clearwater Revival" in the 1960s. Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1026 (1994). "Creedence Clearwater Revival" was known for its distinctive "swamp rock" style of music. Fogerty, 114 S. Ct. at 1026 n.2.
2. Fogerty, 114 S. Ct. at 1025.
3. Id. Fantasy obtained, by assignment, the "Run Through the Jungle" copyright from its predecessors in interest who had purchased the exclusive publishing rights from Fogerty. Id. Fantasy's predecessors in interest include Fantasy/Galaxy Records and Argosy Venture which used various business names including "Jondora Music," "Cireco," "Galaxy," and "Debut of California." Petitioner's Brief at 5 n.5, Fogerty v. Fantasy, Inc., 114 S. Ct. 1023 (1994) (No. 92-1750).
4. Fogerty, 114 S. Ct. at 1026.
5. Id. Besides Warner Brother Records, Inc., the following were also named as defendants in Fantasy's copyright infringement suit: WEA International, Inc., WEA Manufacturing, Inc., Warner-Elektra-Atlantic Corporation, and Warner Communications, Inc. (collectively referred to as the "Warner Defendants"). Petitioner's Brief, cited at note 3, at i. John Fogerty indemnified and reimbursed the Warner Defendants for their costs and attorney's fees incurred in the suit because of an agreement with the Warner Defendants. Id. at 4 n.3.
6. Fogerty, 114 S. Ct. at 1026. The district court denied defendant Warner Brother Records' motion for summary judgment ruling that a copyright owner could infringe the exclusive rights that he had granted to another. Fantasy, Inc. v. Fogerty, 654 F. Supp. 1129, 1131 (N.D. Cal. 1987), aff'd, 984 F.2d 1524 (9th Cir.)
reasonable attorney's fees pursuant to the Copyright Act of 1976. The district court, following Ninth Circuit precedent, denied the motion because Fantasy's infringement suit was not frivolous or in bad faith. The Court of Appeals for the Ninth Circuit affirmed the decision refusing to abandon their dual standard.

To resolve the conflict between the dual standard followed by the Ninth, Second, Seventh and District of Columbia Circuits, and the evenhanded standard followed by the Third, Fourth and Eleventh Circuits, the Supreme Court granted certiorari. The Supreme Court also addressed Fogerty's contention that pursuant to the neutral language of Section 505 of the Copyright Act of 1976 both prevailing plaintiffs and defendants should automatically be awarded attorney's fees, unless there were exceptional circumstances. Chief Justice Rehnquist delivered the opinion of the Court which rejected both the dual standard followed by the Ninth Circuit and Petitioner Fogerty's claim that attorney's fees should be awarded automatically to the prevailing party in a copyright infringement suit.

Three arguments were advanced by Fantasy in favor of the dual standard for awarding attorney's fees in copyright infringement suits. First, Fantasy contended that the language of Section 505 was similar to a provision of Title VII of the Civil Rights Act of 1964 and that in Christiansburg Garment Co. v.

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7. *Fogerty*, 114 S.Ct. at 1026. The Copyright Act provides that:
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 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. 17 U.S.C. § 505 (1988).

8. *Fantasy*, Inc. v. *Fogerty*, 984 F.2d 1524, 1532 (9th Cir. 1993), rev'd, 114 S. Ct. 1023 (1994). The district court held that even though Fogerty wrote the original song he could be liable for copyright infringement. *Fantasy*, 654 F. Supp. at 1131.

9. *Fantasy*, 984 F.2d at 1533. The Ninth Circuit's standard generally allowed an award of attorney's fees to prevailing plaintiffs as a matter of course, while prevailing defendants were required to show that the suit brought against them was frivolous or in bad faith. Id. at 1532. In contrast, other circuits followed an evenhanded standard, whereby prevailing plaintiffs and prevailing defendants were held to the same standard which did not require a showing of bad faith. *Fogerty*, 114 S. Ct. at 1027 n.8.


12. Id. Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, and Ginsburg joined in the opinion. Justice Thomas filed an opinion concurring in the judgment. Id. at 1025.

13. Id. at 1027.

the Court's interpretation of the language of Title VII supported a differentiation in the treatment of prevailing plaintiffs and defendants. Fantasy further argued that in *Flight Attendants v. Zipes*, the Court reasoned that similar language in fee-shifting statutes was a strong indication that an analogous interpretation of the statutes would be necessary.

The Court rejected this argument because the factors present in *Christiansburg* were not present in a case of copyright infringement. The Court reasoned that the goals, the policy objectives of the Civil Rights Act, and the intent of Congress to achieve those objectives by using plaintiffs as private attorneys general differed from those of the Copyright Act which sought to stimulate artistic creativity. The Court pointed out that through the passage of the Civil Rights Act, Congress sought to encourage private enforcement by providing for the private attorney general plaintiff who could not afford to litigate his claims against defendants with greater resources. The Court contrasted this with the objective of the Copyright Act which was to enrich the general public through the encouragement of original authorship of literary, artistic and musical expression. Furthermore, the Court asserted that in copyright infringement cases both plaintiffs and defendants could be either corporate giants or struggling artists, and should be treated equally. The Court noted that the fee shifting provisions of the federal patent and trademark statutes supported an even-handed standard with similar language to the Copyright Act, but only awarded attorney's fees in exceptional cases.

"the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs." *Id.*

*15. 434 U.S. 412 (1978).* The Court decided that a prevailing plaintiff in a Title VII case would be awarded attorney's fees in all but exceptional circumstances, while a prevailing defendant had to show that the plaintiff's claim was frivolous, unreasonable or without merit. *Christiansburg,* 434 U.S. at 422.


*17. 491 U.S. 754 (1989).*

*18. *Fogerty,* 114 S. Ct. at 1028 (citing *Zipes,* 491 U.S. at 758 n.2).


*20. Id.*

*21. Id.* The Court noted that the plaintiff was the means that Congress had selected to enforce its civil rights policy objectives. *Id.*

*22. Id.*

*23. Id.*

*24. The federal patent and trademark statutes regulate subject matter that is analogous to the subject matter regulated by the copyright statute. *Fogerty,* 114 S. Ct. at 1028-29 n.12.

Fantasy's second argument was that the dual standard furthered the objectives of the Copyright Act by encouraging litigation of claims of copyright infringement as a deterrent to such infringement. The Court rejected this argument, reasoning that discouraging infringement was not the only objective of the Copyright Act. The Court pointed out that both plaintiffs and defendants in a copyright infringement suit could hold copyrights. Additionally, the Court noted that a successful defense in a copyright infringement suit could further artistic creativity for the good of the public just as much as a successful prosecution of a copyright infringement claim by a copyright owner. Therefore, the Court opined that defendants who wanted to advance copyright infringement defenses should be encouraged to do so to the same extent that copyright owners were encouraged to litigate infringement claims.

Fantasy's final argument was that the legislative history exhibited a congressional ratification of the dual standard by adopting the nearly identical language of the Copyright Act of 1909 knowing that the lower courts uniformly followed this dual standard. Fantasy also claimed that two copyright office studies, the Strauss Study and the Brown Study, submitted to Congress when studying revisions to the 1909 Copyright Act, purported to inform Congress when studying revisions to the 1909 Copyright Act, purported to inform Congress of the well-established dual stan-

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26. Fogerty, 114 S. Ct. at 1029. The Ninth Circuit had previously expressed such an opinion. See McCulloch v. Albert E. Price, Inc., 923 F.2d 316, 323 (9th Cir. 1987). The Court reasoned that "because § 505 is intended in part to encourage the assertion of colorable copyright claims, to deter infringement, and to make the plaintiff whole, fees are generally awarded to the prevailing plaintiff." Fogerty, 114 S. Ct. at 1029 (quoting McCulloch, 923 F.2d at 323).

27. Fogerty, 114 S. Ct. at 1029. The Court noted that the Act also seeks to encourage artistic creativity. Id. Congress has been granted the power "(t)o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

29. Id. at 1030.
30. Id.
32. Fogerty, 114 S. Ct. at 1030. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." Id. (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978)).
The Court rejected Fantasy's argument after reviewing the prior case law and concluded that there was no settled dual standard interpretation of Section 40 of the Copyright Act of 1909, and therefore, Congress could not have been aware of a dual standard. Additionally, the Court concluded that neither the Strauss Study nor the Brown Study endorsed a dual standard of interpretation.

In contrast, the Petitioner argued that because of the neutral language of Section 505 of the Copyright Act of 1976 both prevailing plaintiffs and defendants should have an automatic award of attorney's fees, barring exceptional circumstances. The Court rejected this contention for two reasons. First, the opinion noted that the plain language of Section 505 required the trial court to use discretion, because Section 505 stated that the court may award reasonable attorney's fees. An automatic award, the Court reasoned, would remove a court's discretion.

Second, the American Rule, which was generally followed by Congress, required that parties had to bear the cost of their own attorney's fees unless Congress had provided to the contrary. Finally, the Supreme Court noted that no court had held that Section 505 of the Copyright Act adopted the British Rule.

Consequently, the Court held that both prevailing plaintiffs and prevailing defendants should be treated the same and that attorney's fees were to be awarded to the prevailing party only at the discretion of the court. The decision of the Court of Appeals for the Ninth Circuit was reversed and remanded.

Justice Thomas concurred in the judgment, but disagreed with the analysis in Christiansburg Garment Co. and the Court's use of that analysis to interpret the Copyright Act's language. He asserted that the result of the Court's analysis produced different interpretations, despite the fact that Section 505 of the Copyright Act of 1976 and Title VII of the Civil Rights Act of

35. Fogerty, 114 S. Ct. at 1030.
36. Id. at 1032.
37. Id. at 1031.
38. Id. at 1033. The Court noted that this practice was called the British Rule. Id.
39. Id.
40. Fogerty, 114 S. Ct. at 1033.
41. Id.
42. Id.
43. Id.
44. Id.
45. Fogerty, 114 S. Ct. at 1033.
46. Id. at 1033-34 (Thomas, J., concurring).
1964 had virtually identical language.\footnote{Id. at 1034. See note 7 for text of Section 505 and note 14 for text of Section 2000e-5(k).}

The concurrence noted that, in this case, the Court embraced a plain language interpretation, while in Christiansburg it rejected a plain language interpretation as mechanical and untenable, and relied instead on equitable considerations of the statute's policies and legislative history.\footnote{Id.} Justice Thomas emphasized that such an approach was inconsistent and created an uncertainty in the law.\footnote{Id. at 1035.} Additionally, the concurring opinion asserted that the majority's reasoning that application of a plain meaning approach should be dependent on the statute's policy objectives and legislative history was mistaken.\footnote{Id.} Justice Thomas opined that even though Christiansburg mistakenly disregarded statutory language to take into account equitable considerations, \textit{stare decisis} precluded overruling this questionable precedent.\footnote{Fogerty, 114 S. Ct. at 1035 (Thomas, J., concurring).} Accordingly, Justice Thomas asserted that he would refuse to use the Christiansburg analysis in the future.\footnote{Id.} He concluded that the majority's plain meaning interpretation of Section 505 was appropriate.\footnote{Id.}

The American Rule followed by the courts and Congress required parties to pay their own attorney's fees unless Congress provided a statutory provision to the contrary.\footnote{Id.} The first case to present this issue to the Supreme Court was \textit{Arcambel v. Wiseman},\footnote{Id. at 1035.} in which the Court disallowed an award of $1,600 for attorney's fees.\footnote{Fogerty, 114 S. Ct. at 1023.}

In 1872, the Court addressed this issue more thoroughly in \textit{Oelrichs v. Spain},\footnote{3 U.S. (3 Dall.) 306 (1796). The details of the case were not discussed in the opinion.} and disallowed the award of attorney's fees.\footnote{Id.} In \textit{Oelrichs}, a lien was placed on the proceeds of

\footnote{Arcambel, 3 U.S. (3 Dall.) at 306. The Court held: We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute. Id.}

\footnote{82 U.S. (15 Wall.) 211 (1872).}

\footnote{\textit{Oelrichs}, 82 U.S. (15 Wall.) at 230.}
bonds. The trial court assessed damages and attorney’s fees against the defendant. The Supreme Court affirmed the trial court’s decision, but disagreed with the trial court’s award of attorney’s fees. The Court held that attorney’s fees were not allowable, relying on Arcambel. The Oelrichs Court asserted that in debt, contract and assumpsit actions, attorney’s fees were never included in the damages; therefore, they should not be awarded in equity cases. The Court noted that even though damage awards might indirectly compensate a plaintiff for his attorney’s fees, the fees could not be used as an element of the damage award.

Congress made a provision for an award of attorney’s fees in the Copyright Act of 1909. In Vernon v. Sam S. & Lee Shubert, Inc., the District Court for the Southern District of New York denied a prevailing defendant attorney’s fees because the infringement suit was brought in good faith. The plaintiff sent an unsolicited manuscript of his copyrighted play to defendant’s stage director. The defendant, who had not read the plaintiff’s play, wrote a similar play which the plaintiff assumed had been copied from his own play. The issue before the court was whether the defendant had first read the plaintiff’s play or had acted independently when he wrote his own similar play.

The court ruled that there was no infringement, and then held that because it was reasonable for the plaintiff to believe that his copyright had been infringed, the plaintiff’s suit was brought in good faith. As a result, the court concluded that no costs should be awarded against the plaintiff.
Marks v. Leo Feist, Inc., 73 involved a copyright infringement question which was resolved in favor of the defendant. 74 The plaintiff alleged that the defendant had infringed the plaintiff's copyrighted song "Wedding Dance Waltz" with the defendant's composition "Swanee River Moon." 75 The district court dismissed the plaintiff's complaint with costs and awarded a $1,500 attorney's fee. 76 The Court of Appeals for the Second Circuit affirmed the district court's decision. 77 The court reasoned that the general rule detailed in Arcambel was still followed, but that Congress in the Copyright Act of 1909 had provided for an award of attorney's fees by the courts at their discretion. 78 The circuit court then concluded that the language of the statute allowed the prevailing party to recover costs as a matter of right, but left the award of attorney's fees, as part of the costs, to the discretion of the court. 79

In 1947, the Court of Appeals for the Seventh Circuit held, in Official Aviation Guide Co. v. American Aviation Associates, Inc., 80 that the prevailing defendant in a copyright infringement suit should be awarded ordinary costs, but that the trial court did not abuse its discretion in denying attorney's fees as part of those costs. 81 In Official Aviation Guide, the plaintiff had alleged infringement by the defendant of five copyrights. 82 The Seventh Circuit reversed the judgment of the district court and remanded the case with instructions to dismiss the complaint. 83

The district court dismissed the complaint and denied the defendant's subsequent motion praying for costs and attorney's fees; the defendant appealed. 84 The Seventh Circuit opined that the Copyright Act of 1909 required a mandatory award of ordinary costs to a prevailing party, and also noted that the Act made the award of attorney's fees discretionary. 85 The court

73. 8 F.2d 460 (2d Cir. 1925).
74. Marks, 8 F.2d at 460.
75. Id.
76. Id.
77. Id. The circuit court did lower the attorney's fees award from $1,500 to $500 because it thought that the district court had "inadvertently committed an error in judgment." Id. at 461.
78. Id.
79. Marks, 8 F.2d at 461.
80. 162 F.2d 541 (7th Cir. 1947).
82. Id. at 542. The district court ruled in favor of the plaintiff and issued a permanent injunction. Id.
83. Id.
84. Id. at 543.
85. Id.
reasoned that because the case was not brought in bad faith and involved a complicated question of law, the trial court did not abuse its discretion in denying an award of attorney's fees to the prevailing defendant. 86

The Ninth Circuit followed the reasoning of the Seventh Circuit in Overman v. Loesser, 87 when it denied the award of attorney's fees to the prevailing defendant. 86 The circuit court refused to overturn a finding that the defendant had not copied the plaintiff's song. 88 The court asserted, using language similar to the Seventh Circuit's, that because the case was hard fought, brought in good faith and presented a complex problem of law, an award of attorney's fees to the prevailing defendant should be denied. 89

In Breffort v. I Had A Ball Co., 90 the District Court for the Southern District of New York crystallized the dual standard. The plaintiffs, owners of a copyrighted play, sued the author and producer of the infringing musical play and the writers of the songs and lyrics used in the infringing play. 92 The court ruled in favor of the plaintiffs against the producer and writer of the infringing play, and in favor of the song writer defendants. 93 The court then approved an award of attorney's fees to be paid by the losing defendants, the producer and the writer, but denied attorney's fees to the prevailing defendants, the song writers. 94

The district court held that prevailing plaintiffs and defendants should be treated differently as to the awarding of attorney's fees. 95 The opinion reasoned that the purpose of awarding attorney's fees to a plaintiff was to deter copyright infringement, whereas the purpose of granting an award to a prevailing defendant was to impose a penalty on the plaintiff for bringing a suit that was in bad faith, unreasonable or frivolous. 96 Because the plaintiff's case did not fall into one of these categories, the court denied the request for attorney's fees to the prevailing defendants. 97

86. Official Aviation Guide, 162 F.2d at 543.
87. 205 F.2d 521 (9th Cir. 1953).
88. Overman, 205 F.2d at 524.
89. Id.
90. Id.
93. Id.
94. Id. at 627-28.
95. Id. at 627.
96. Id.
In *Diamond v. Am-Law Publishing Corp.*, the Second Circuit affirmed a district court's use of a dual standard similar to *Breffort*. *Diamond* involved an appeal from the district court's grant of summary judgment dismissing the plaintiff's claim of copyright infringement and from the award of attorney's fees to the prevailing defendants. The plaintiff alleged copyright infringement because the defendants had wrongfully appropriated the plaintiff's copyrighted letter to the editor by publishing a substantial excerpt when the plaintiff had given permission to publish the letter only in its entirety. The circuit court reasoned that because the intent of Section 505 of the Copyright Act of 1976 was to foster the filing of colorable claims and to discourage infringement, prevailing plaintiffs were generally awarded attorney's fees. The court opined that an award to prevailing defendants would deter plaintiffs from bringing colorable claims. The court suggested that because the award of attorney's fees was based on a statute, a finding of bad faith was not necessary for an award of those fees. The court concluded that the district court did not abuse its discretion by awarding attorney's fees to the defendant because the plaintiff's copyright infringement claims were without a reasonable legal basis.

*Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, and *McCulloch v. Albert E. Price, Inc.* shaped the Ninth Circuit's version of the dual standard. In *Cooling Systems*, the plaintiff alleged that the defendant had infringed the plaintiff's copyright by publishing a radiator catalog that was similar to the plaintiff's catalog. The district court dismissed the plaintiff's suit and awarded the defendant attorney's

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98. 745 F.2d 142 (2d Cir. 1984).
100. Under Rule 56 of the Federal Rules of Civil Procedure:
The [summary] judgment shall be rendered forthwith if the pleadings, deposition,
answers to interrogatories, and admissions on file, together with the
affidavits, if any, show that there is no genuine issue as to a material fact
and the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).
101. *Diamond*, 745 F.2d at 143.
102. *Id.* at 145-46.
103. *Id.* at 148.
104. *Id.*
105. *Id.*
106. *Diamond*, 745 F.2d at 149.
107. 777 F.2d 485 (9th Cir. 1985).
108. 823 F.2d 316 (9th Cir. 1987).
fees. The circuit court ruled that an award of Section 505 attorney's fees to a prevailing party required a finding of bad faith or frivolity. The court held that even though the district court did not make a specific finding of bad faith or frivolity, there were sufficient indicia in the record to justify the district court's discretionary award of attorney's fees to the defendants.

In *McCulloch*, the circuit court considered an appeal by the defendant of a copyright infringement judgment awarding damages and attorney's fees to the plaintiff. The plaintiff claimed copyright infringement because the defendant had made and sold copies of the defendant's copyrighted decorative plate. The district court held that the defendant had infringed plaintiff's copyright, and therefore enjoined defendant from further sales of the infringing plate and also awarded the plaintiff attorney's fees. The defendant claimed that the district court did not make a finding of bad faith or frivolity and therefore abused its discretion by awarding attorney's fees to the plaintiff. The circuit court distinguished *McCulloch* from *Cooling Systems* by pointing out that *Cooling Systems* involved a prevailing defendant while *McCulloch* involved a prevailing plaintiff. The court held that for a grant of attorney's fees to a prevailing plaintiff, a finding of bad faith or frivolity was not required.

In *Cohen v. Virginia Electric & Power Co.*, the District Court for the Eastern District of Virginia rejected the dual standard and adopted an evenhanded approach. The issue in *Cohen* was whether the defendant should be awarded Section 505 attorney's fees after the court allowed the plaintiff to withdraw its copyright infringement complaint. The court ruled that the defendant was the prevailing party and therefore awarded attorney's fees. The plaintiff argued that a prevailing defen-

110. Id. at 486-87.
111. Id. at 493.
112. Id. at 493-94.
114. Id.
115. Id.
116. Id. at 322.
117. Id.
118. *McCulloch*, 823 F.2d at 322.
121. Id. at 623.
dant should only be entitled to attorney’s fees if there was a finding that the plaintiff’s case was frivolous, vexatious or brought in bad faith.\textsuperscript{122} The plaintiff also contended that because Section 505 was similar to the attorney’s fee provision of Title VII of the Civil Rights Act of 1964\textsuperscript{123} it should be similarly interpreted.\textsuperscript{124}

The plaintiff argued that the Supreme Court in \textit{Christiansburg Garment Co. v. EEOC},\textsuperscript{125} held that under Title VII, prevailing defendants must show that the plaintiff’s case was frivolous, meritless or vexatious before being awarded attorney’s fees.\textsuperscript{126} The district court noted that the Supreme Court interpreted the legislative history of Title VII to show that Congress intended that plaintiffs and defendants should be treated differently with respect to attorney’s fees, even though the language of the statute did not indicate different treatment.\textsuperscript{127} The district court then asserted that no similar legislative history existed for Section 505.\textsuperscript{128} The court reasoned that because Congress gave no indication of how to interpret the statute, the court was bound by its plain meaning.\textsuperscript{129} The district court rejected the Second Circuit’s contention in \textit{Diamond}, that prevailing plaintiffs and prevailing defendants should be treated differently with respect to an award of Section 505 attorney’s fees.\textsuperscript{130} The district court asserted that the Second Circuit’s interpretation of the law was incorrect.\textsuperscript{131} The court concluded that because nothing in the statute or in the legislative history distinguished between prevailing plaintiffs and defendants, the courts had no authority to make such a distinction.\textsuperscript{132}

\textsuperscript{122} \textit{Id.} at 620.
\textsuperscript{124} \textit{Cohen}, 617 F. Supp. at 621.
\textsuperscript{125} 434 U.S. 412 (1978).
\textsuperscript{126} \textit{Cohen}, 617 F. Supp. at 620-21.
\textsuperscript{127} \textit{Id.} at 621 (citing \textit{Christiansburg}, 434 U.S. at 420). The district court said “it is clear that the words Congress uses in such statutes does [sic] not necessarily convey the intent of Congress as discerned by the courts.” \textit{Cohen}, 617 F. Supp. at 621.
\textsuperscript{128} \textit{Id.} The legislative history of Section 505 states, “[u]nder section 505 the awarding of costs and attorney’s fees are left to the court’s discretion, and the section also makes clear that neither costs nor attorney’s fees can be awarded to or against ‘the United States or an officer thereof.’” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 163 (1976), \textit{reprinted} in 1976 U.S.C.C.A.N. 5659, 5779.
\textsuperscript{129} \textit{Cohen}, 617 F. Supp. at 623.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 622.
\textsuperscript{132} \textit{Id.}
In *Lieb v. Topstone Industries, Inc.* the Third Circuit also adopted an evenhanded approach for the awarding of attorney’s fees. *Lieb* addressed whether the district court abused its discretion by denying defendants attorney’s fees after it granted summary judgment for defendants in a copyright infringement suit. The plaintiff alleged copyright infringement because the defendant had produced an audio cassette of Halloween sounds similar to the plaintiff’s tape, entitled “Haunted Horror.” Because the plaintiff admitted that the defendant did not copy the plaintiff’s tape directly, the district court granted summary judgment to the defendant and denied an award of attorney’s fees without any explanation. The circuit court remanded the case to the district court to explain the reasons for denying attorney’s fees. The Third Circuit reviewed and rejected the Second Circuit’s reasons, articulated in *Diamond,* for adopting a dual standard. The Third Circuit, like the *Cohen* court, could not find a justification for treating the plaintiffs and defendants differently. The court then held that an award of attorney’s fees should not be granted in every copyright infringement case because Congress clearly gave the courts discretion in making the award.

In *Sherry Manufacturing Company, Inc. v. Towel King of Florida, Inc.* the Eleventh Circuit clarified its evenhanded approach for awarding Section 505 attorney’s fees. The issue in *Sherry Manufacturing* was whether the district court properly awarded attorney’s fees to the prevailing defendant in a copyright infringement case. The plaintiff alleged that the defendant sold beach towels that incorporated the plaintiff’s copyrighted design and the district court held in favor of the plaintiff. On appeal, the circuit court reversed and remanded the decision, ruling that the plaintiff’s design was not copyrightable. On remand, the district court awarded the prevailing

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133. 788 F.2d 151 (3d Cir. 1986).
134. *Lieb,* 788 F.2d at 156.
135. *Id.* at 153.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Lieb,* 788 F.2d at 154-55.
140. *Id.* at 155.
141. *Id.* at 155-56.
142. 822 F.2d 1031 (11th Cir. 1987).
143. *Sherry Mfg.*, 822 F.2d at 1033.
144. *Id.*
145. *Id.*
defendant attorney's fees.\textsuperscript{146} The circuit court vacated this decision and again remanded the case to the district court for a clarification of the reasoning used by the court in the decision to award attorney's fees to the defendant.\textsuperscript{147} As guidance to the district court, the circuit court stated that the district court had the discretionary power to award fees to any prevailing party.\textsuperscript{148} The opinion indicated that there was no requirement to show bad faith or a frivolous suit by the losing party, but the losing party's good faith could be considered by the court in its decision of whether to exercise its discretion and award attorney's fees.\textsuperscript{149} Additionally, the circuit court stated that the only condition for the award of attorney's fees to a party should be that the party must have prevailed.\textsuperscript{150}

The courts have continually struggled with their discretionary power to award attorney's fees to a prevailing party in copyright infringement cases. Diverging court decisions have provided numerous reasons for awarding or denying attorney's fees. The District Court for the Southern District of New York in 1905 denied a prevailing defendant attorney's fees in \textit{Vernon} because the plaintiff's suit was brought in good faith.\textsuperscript{151} In 1925, the Second Circuit upheld an award of attorney's fees to a prevailing defendant in \textit{Marks} because the statute allowed such an award.\textsuperscript{152} The Seventh Circuit in \textit{Official Aviation Guide} upheld the denial of an award of attorney's fees by the district court because the case was "hard fought and prosecuted in good faith, and it presented a complex question in law."\textsuperscript{153} In 1953, the Ninth Circuit agreed with this reasoning in \textit{Overman} and denied attorney's fees to the prevailing defendant.\textsuperscript{154}

Then in 1963, the District Court for the Southern District of New York created new law in \textit{Breffort}. The court held that prevailing defendants and prevailing plaintiffs should be treated differently and that a prevailing defendant could only be awarded attorney's fees if the plaintiff's case was in bad faith, unreasonable or frivolous.\textsuperscript{155} No previous court had ruled in this

\begin{itemize}
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} \textit{Sherry Mfg.}, 822 F.2d at 1034.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} \textit{Vernon v. Sam S. & Lee Shubert, Inc.}, 220 F. 694, 696 (S.D.N.Y. 1915).
\item \textsuperscript{152} \textit{Marks v. Leo Feist, Inc.}, 8 F.2d 460, 461 (2d Cir. 1925).
\item \textsuperscript{153} \textit{Official Aviation Guide Co. v. American Aviation Associates, Inc.}, 162 F.2d 541, 543 (7th Cir. 1947).
\item \textsuperscript{154} \textit{Overman v. Loesser}, 205 F.2d 521, 524 (9th Cir. 1953).
\item \textsuperscript{155} \textit{Breffort v. I Had A Ball Co.}, 271 F. Supp. 623, 627 (S.D.N.Y. 1967).
\end{itemize}
fashion.\textsuperscript{166} All of the previous decisions merely enumerated some of the factors that the courts used in determining whether an award of attorney's fees was warranted.\textsuperscript{157} However, the Second Circuit embraced the reasoning of\textit{Breffort}, in\textit{Diamond}, and the dual standard was recognized.\textsuperscript{158} But the reasoning of the Second Circuit, which was the same reasoning used by the Ninth Circuit and the argument asserted by Fantasy in\textit{Fogerty} was flawed.\textsuperscript{159}

The language of Section 505 of the Copyright Act of 1976 is clear and unambiguous. The section authorizes the courts at their discretion to award attorney's fees to the \textit{prevailing party}.\textsuperscript{160} It does not differentiate between prevailing plaintiffs and prevailing defendants.\textsuperscript{161} In\textit{Negonsott v. Samuels},\textsuperscript{162} the Supreme Court opined that in determining the meaning of a statute the Court must effectuate the will of Congress, and when that will had been put forth in plain language, the language was conclusive.\textsuperscript{163}

If the language is not clear, the courts can use legislative history to help determine the intent of Congress.\textsuperscript{164} But the Supreme Court has warned that the plain meaning of a statute cannot be overcome by legislative history which may provide ambiguous and dubious direction.\textsuperscript{165} The legislative history of Section 505 does not distinguish between prevailing plaintiffs and prevailing defendants.\textsuperscript{166} Because the language of Section 505 is clear and the legislative history does not contradict the plain language, the Supreme Court had no choice but to follow the plain meaning and hold that prevailing plaintiffs and prevailing defendants should be treated the same and be awarded attorney's fees at the discretion of the court.\textsuperscript{167} This author suggests that the Supreme Court made the proper decision given


\textsuperscript{157} Id.


See notes 98-106 and accompanying text for a discussion of\textit{Diamond}.

\textsuperscript{159} See\textit{Fogerty}, 114 S. Ct. at 1027.


\textsuperscript{161}\textit{Fogerty}, 114 S. Ct. at 1027.

\textsuperscript{162} 113 S. Ct. 1119 (1993).

\textsuperscript{163}\textit{Negonsott}, 113 S. Ct. at 1122-23 (quoting Griffen v. Ocean Contractors, Inc., 458 U.S. 564, 570 (1982)).


\textsuperscript{165} See Gemsco v. Walling, 324 U.S. 244, 260 (1945).

\textsuperscript{166} See note 128 for text of legislative history of Section 505.

\textsuperscript{167}\textit{Fogerty}, 114 S. Ct. at 1033.
the unambiguous language of the statute and the lack of any evidence showing that Congress intended a different interpretation of the statute.

The Supreme Court did not, however, give the district courts any clear guidelines on when they should exercise their discretion in the awarding of attorney's fees in copyright infringement suits. All the opinion accomplished was to define the boundaries for this decision. One boundary was set by the Court when it held that fees should not be awarded automatically, as Petitioner Fogerty had suggested. The other boundary was set by the requirement of the patent and trademark statutes which only award attorney's fees to the prevailing party in exceptional cases. The Supreme Court noted that this requirement was in addition to what was called for by the copyright statute, consequently, the requirement should not be necessary for an award of attorney's fees under the statute. The question then becomes what is necessary to trigger an allowance of attorney's fees. Must there be bad faith, unreasonableness or frivolity before an award is allowed by the court? Will a hard fought prosecution of a complex problem of law preclude an award of attorney's fees as the Seventh Circuit held in Official Aviation Guide? These are questions that the Supreme Court left unanswered in Fogerty.

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168. Id.
169. See notes 24-25 and accompanying text.
170. Fogerty, 114 S. Ct. at 1028 n.12.
171. See Official Aviation Guide, 162 F.2d at 543.