but it would go a part of the way toward shifting the copyright balance from distributors to creators, and it would be fine under Berne and TRIPS. Indeed, we can go much farther than that: We could offer authors meaningful attribution and integrity rights. That's not only fine under Berne and TRIPS, Berne requires it. We're in breach of our treaty obligations because we promised we would do that and failed to follow up. Similarly, a host of private copying exclusions appear to be Berne—and TRIPS—compliant. A variety of different reformulations of the exclusive rights would pass muster under Berne and TRIPS.

This is to say that our treaty obligations leave us a fair amount of room. More importantly, though, the kinds of incentives that made sense in the 19th or even the 20th century may not make sense in the 21st. If we figure out something that would work better than the current model of copyright law, and we figure out why, then from there we can try to sort out whether we can fit it within our treaty obligations or whether it's worthwhile to seek to vary the terms of the relevant treaties.

Besides, it's just a thought experiment. If everyone in the room went home and wrote down a draft statute, none of those bills would end up being enacted as The Copyright Revision Act of 2026. It seems entirely possible, though, that if we all indulge in this thought experiment or ones like it, the conversations we are doomed to have about copyright reform over the next eighteen or so years will be more civil, more interesting, and more useful. ■

Intellectual Property Law Review

A Lesson from Swamp Rock

Mary Jane Saunders, general counsel to the Subway Franchisee Advertising Fund Trust Ltd., spoke to the *Marquette Intellectual Property Law Review* banquet last year. Her speech recounted three Supreme Court decisions involving intellectual-property law and can be found in full at 13 Marq. Intell. Prop. L. Rev. 451. This is an excerpt from her remarks.

Fogerty v. Fantasy, Inc. is a case that I have used to great advantage. John Fogerty was the lead guitarist and chief lyricist for Creedence Clearwater Revival, the group that brought you many timeless rock-and-roll classics, including *Proud Mary*, *Born on the Bayou*, *Have You Ever Seen the Rain?*, and *Bad Moon Rising*.

The Fogerty case is about my all-time favorite Creedence song—a little swamp rock ditty called *Run Through the Jungle*, which Fogerty wrote in 1970. Many people think that this song is about the Vietnam War and the extreme emotion nine years of the United States' active combat brought to this country, but Fogerty has said that the song is actually about gun control. He thought that Americans were simply too gun-happy.

I would describe *Run Through the Jungle* as a litigation-happy song. Creedence Clearwater Revival broke up in 1972 because the other members did not think Fogerty was giving them enough voice as artists and was cutting them out of financial decisions. He was apparently a bit of a control freak. After the band broke up, Fogerty got into a bunch of contract disputes with Fantasy, the band's record label. To settle the disputes and get out from under his contract obligations, Fogerty assigned his publishing and distribution rights to Fantasy. ▸▸

Then in 1984, 14 years after he wrote *Run Through the Jungle*, Fogerty wrote a new song called *The Old Man Down the Road*. Fantasy Records thought that the song sounded too much like *Run Through the Jungle* because it was a swamp rock song, so it sued Fogerty for copyright infringement.

Fogerty won the copyright case. The trial judge found that an artist simply could not plagiarize himself. You would think that would end things, but here is where the case got really interesting. After winning, Fogerty tried to get his attorney fees and costs. At that time, prevailing plaintiffs tended to get their fees awarded as a matter of course, but with Fogerty, the trial court and then the Ninth Circuit said that prevailing defendants could not get their fees unless they showed that the original claim was frivolous or made in bad faith.

Fogerty ultimately appealed the case to the Supreme Court, obviously not on the copying issue, but rather on the question of his demand for an award of attorney's fees. The Supreme Court agreed with Fogerty that there should not be a dual standard for prevailing plaintiffs and prevailing defendants. After all, the Copyright Act says that a court "may . . . award a reasonable attorney's fee to the prevailing party as part of the costs."

Of course, the Copyright Act says that a court "may" award attorney's fees. There is no automatic award when you prevail. How does a court decide? The Supreme Court said that courts are supposed to exercise "equitable discretion."

Now, what happened with Fogerty? On remand, the district court gave him an award of $1.3 million in fees. The court based its award on several factors. First, Fogerty prevailed with respect to his copyright in *The Old Man Down the Road*, which the Court said secured the public's access to an original work of authorship and paved the way for future original compositions—by Fogerty and others—in the same distinctive swamp rock style and genre. The district court also reasoned that while Fantasy litigated in good faith, Fogerty's defense was the type of defense that furthers the purposes underlying the Copyright Act and therefore should be encouraged through a fee award. Further, the district court found that a fee award was appropriate to help restore to Fogerty some of the lost value of *The Old Man Down the Road* copyright that he was forced to defend.

Did Fantasy Records just pay up? No. It appealed. Fantasy argued that the district court abused its discretion in awarding fees to Fogerty because Fantasy was "blameless" in pursuing a "good faith" and "faultless" lawsuit.

Luckily, the Ninth Circuit agreed with Fogerty this time around. The court found that the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. It affirmed the award of fees and went one step further by remanding the case back to the district court so that the district court could give Fogerty another fee award—his fees for defending Fantasy's appeal.

During the course of my career, I have represented copyright owners who have had their rights cruelly and unfairly stolen by unscrupulous copyists and infringers. I have also represented honest, hard-working business people who have been maliciously and unfairly accused of stealing someone else's intellectual property simply because they put out a competitive product.

What the plaintiffs and the defendants have in common is that they all need lawyers and all lawyers cost money. Just citing the *Fogerty* decision can sometimes keep your clients out of court. It may inspire a defendant to settle or it may dissuade a plaintiff from bringing a questionable case. All plaintiffs mention attorney's fees in their cease-and-desist letters, but few of them remember that they might end up paying the defendant's fees if they lose. ■