

# SEEKING RIGHTS, NOT RENT: HOW LITIGATION FINANCE CAN HELP BREAK MUSIC COPYRIGHT'S PRECEDENT GRIDLOCK

GLENN E. CHAPPELL<sup>†</sup>

## ABSTRACT

*Since its inception, litigation finance has steadily grown in prevalence and popularity in the United States. While many scholars have examined its merits, few have considered litigation finance specifically in the context of copyright law. This is most unfortunate, for there, a vicious cycle has taken hold: high litigation costs discourage many market participants from taking cases to trial or summary judgment in order to vindicate their legal rights, even when they have strong cases. Thus, parties settle almost every case, which in turn prevents resolution of longstanding precedential questions in critical areas of copyright law. The legal uncertainty resulting from this precedential gridlock generates higher avoidance costs and poses more financial risks for market participants, particularly less-heeled or less-established parties.*

*This Note proposes one way in which litigation finance could help break that cycle. Specifically, rights holders and defendants alike can use litigation finance to fund strategic-litigation campaigns to pressure the development of precedent. To illustrate how this might work, this Note examines litigation finance in the narrow context of music copyright, an area that perfectly illustrates the problems besetting copyright law writ large. In doing so, this Note flips a popular criticism of litigation finance on its head: while some scholars argue that litigation finance can distort litigation strategy by encouraging litigants to reject mutually beneficial settlements, it is normatively desirable to do so given the unsettled state of music copyright law.*

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<sup>†</sup> Duke University School of Law, J.D. expected 2017; Saint Leo University, B.A. 2011. I wish to thank my family for their support; my colleagues on the *Duke Law and Technology Review* for their helpful edits and suggestions; and Professor Jennifer Jenkins for helping me develop this topic and providing helpful guidance on early drafts of this Note.

## INTRODUCTION

It is well-established in innumerable contexts that “the squeakiest wheel gets the grease.” But what happens when squeaking costs money—a whole lot of money, in fact? Absent other factors, the inevitable result is that only the best-heeled wheels get the attention they seek.

Enter the contemporary civil litigation market.<sup>1</sup> Owing to the high costs of discovery, expert witnesses, legal representation, and other factors, the cost of vindicating one’s legal rights in civil court, either as plaintiff or defendant, has steadily increased for more than two decades.<sup>2</sup> And copyright claims have not been spared from this trend. In fact, some argue that high litigation costs are particularly vexatious for copyright litigants.<sup>3</sup>

But the market has not gone gently into that good night. Instead of surrendering civil litigation entirely to the province of the most gilded rights holders, entrepreneurs have developed litigation finance as a means to facilitate greater access to cash for aspiring litigants of varying economic means.<sup>4</sup> Under the litigation finance model, a prospective litigant—

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<sup>1</sup> See Michael Zhang, *The High Cost of Suing for Copyright Infringements*, PETAPIXEL (June 4, 2015), <http://petapixel.com/2015/06/04/the-high-cost-of-suing-for-copyright-infringements> (discussing how high litigation costs discourage suing even obvious copyright infringers).

<sup>2</sup> See Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies*, Statement for Presentation to Committee on Rules of Practice and Procedure, Judicial Conference of the United States at Duke Law School 2010 Conference on Civil Litigation 2 (May 10–11, 2010), [http://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf) (noting steady increases from 2000 to 2008 and observing that American corporations spend far more on litigation than corporations in other countries).

<sup>3</sup> See, e.g., David Walker, *Daniel Morel and the High Cost of Copyright Infringement Claims*, PHOTO DISTRICT NEWS (June 3, 2015), [www.pdnonline.com/features/Daniel-Morel-and-the-High-Cost-of-Copyright-Infringement-Claims](http://www.pdnonline.com/features/Daniel-Morel-and-the-High-Cost-of-Copyright-Infringement-Claims) (noting “the costs of pursuing copyright claims—especially against wellfunded [sic] opponents—can far exceed the maximum damages that plaintiffs can recover under the law,” and that “[t]he law is structured so there’s little incentive for attorneys to take on a copyright case even if it appears to be a drop-dead winner” (internal quotation marks omitted) (quoting a copyright plaintiff’s attorney)).

<sup>4</sup> See Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 173–74 (2014) (“Litigation finance enables the top-flight lawyer at an hourly fee firm to represent a small plaintiff with a meritorious claim even if the client cannot afford his or her hourly bills and his or her firm refuses to agree to contingent fee arrangements.”); Charles Agee, *Litigation Finance Considerations for Large Corporate Clients*, WESTFLEET ADVISORS BLOG (Sept. 28, 2014), <http://westfleetadvisors.com/blog/litigation-financing-considerations-large-corporate-clients>

presumably in response to either attorney referral or direct advertising—contacts a litigation financing firm and applies for funding.<sup>5</sup> Thereafter, an employee interviews the applicant to gather additional information, reviews the claim, assesses its merits and likelihood of success, and decides whether to fund the costs of the lawsuit.<sup>6</sup> When they do award funds, most litigation finance firms do so on a nonrecourse basis, meaning that the firm will only collect its pre-negotiated return if the litigant wins the case.<sup>7</sup> For plaintiffs, this usually includes a share of the judgment on top of attorney’s fees.<sup>8</sup> For defendants, this usually means collecting an out-of-pocket interest premium from the defendant in addition to attorney’s fees.<sup>9</sup> It is axiomatic, therefore, that risks are high for the funding entity. As a result, most charge high interest rates to justify the risks of funding uncertain suits.<sup>10</sup>

Since its inception, litigation finance has steadily grown in prevalence and popularity, particularly in European nations.<sup>11</sup> In the United States, while legal and ethical uncertainties may have initially hampered the model’s growth,<sup>12</sup> the patchwork of ethical and legal restrictions casting doubt on its validity has loosened in recent years.<sup>13</sup> As a result, litigation finance is now “booming” in the United States.<sup>14</sup>

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(discussing how large corporations can use litigation finance to preserve capital for other investments).

<sup>5</sup> Mariel Rodak, Note, *It’s About Time: A System’s Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 506 (2006).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 506–07.

<sup>8</sup> *Id.* at 506.

<sup>9</sup> William Alden, *New Firm Plans To Invest in Lawsuits*, N.Y. TIMES: DEALBOOK (Apr. 8, 2013, 7:24 AM), <http://dealbook.nytimes.com/2013/04/08/new-firm-plans-to-invest-in-lawsuits>.

<sup>10</sup> Rodak, *supra* note 5, at 506.

<sup>11</sup> See George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J.L. ECON. & POL’Y 451, 522 (2012) (“The UK and certainly continental Europe can be considered more grown up about funding of large commercial disputes than the US. Germany, Europe’s largest economy, has enjoyed an active and mature funding market for more than 10 years, which makes it—together with Australia—one of the world’s early movers in this respect.”).

<sup>12</sup> See generally Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004) (canvassing the various legal and ethical obstacles—particularly state common law “champerty” doctrines—to litigation finance).

<sup>13</sup> See Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. REV. 237, 238 (2015) (“Currently, twenty-seven out of fifty-one jurisdictions—including Arizona, Colorado, California, New Hampshire, New Mexico, Texas, and D.C.—permit

Despite this rapid growth and the scholarly attention accompanying it, one question remains largely unexplored: what can the model do for music copyright? This Note suggests that the strategic use of litigation finance can help copyright law “promote the progress”<sup>15</sup> by enabling parties to vindicate their rights and break the current precedential deadlock in music copyright law. This Note thus flips a popular criticism of litigation finance on its head: while some scholars argue that litigation finance can distort litigation strategy by encouraging litigants to reject mutually beneficial settlements, it is normatively desirable to do so given the current state of music copyright law.

This outcome is desirable because high costs should not shut out lesser-heeled parties—like new and less-known artists and indie labels—from driving the development of legal precedent to further their interests. Rather, the practice of strategically pursuing litigation through to final judgment in multiple courts and jurisdictions to spur favorable precedential development (a type of judicial “rent seeking”<sup>16</sup>) is integral to American legal development, and there is strong historical precedent to light the path ahead. Thus, by using litigation finance to fund otherwise cost-prohibitive lawsuits all the way through judgment, these stakeholders can use litigation finance to more effectively seek rent in the judicial process. Put differently, less-heeled “wheels” in the music industry can use litigation finance to “squeak louder” in order to get the precedential grease.

Focusing on music copyright is justified for two reasons. First, while scholars have written volumes about litigation finance in general, they have scarcely examined its impacts upon copyright law. Moreover, none have specifically considered music copyright, a legal field in particular need of precedential development and one that can serve as a model for legal development in other unsettled fields. Second, music copyright exemplifies an area where rapid technological development has impacted and outpaced the law. An examination of music copyright can therefore illustrate how litigation finance encourages precedential development in areas where technology demands greater judicial flexibility.

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some form of champerty, so long as there is no intermeddling with how the litigation is conducted, the suit is not frivolous, and there is no malice champerty at play.”).

<sup>14</sup> See Jason Krause, *Third-Party Financing Is Growing, and Lawyers Are Big Players*, A.B.A. J. (July 1, 2016, 2:00 AM), [http://www.abajournal.com/magazine/article/third\\_party\\_financing\\_is\\_growing\\_and\\_lawyers\\_are\\_big\\_players](http://www.abajournal.com/magazine/article/third_party_financing_is_growing_and_lawyers_are_big_players) (“In May [2016], Burford Capital released results of an online survey showing 28 percent of responding private practice lawyers say their firms have used litigation financing, as compared to the 7 percent reported in 2013.”).

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>16</sup> See *infra* notes 83–84 and accompanying text.

Part I of this Note briefly canvasses litigation finance's historical and analytical background to provide context. Part II introduces the concept of judicial rent seeking and, importantly, will distinguish the concept of *legitimate* rent seeking advocated here from the term's more ominous meaning in other scholarship. Part III explains music copyright law's "precedent problem," and then unites these threads by analyzing their applicability in, and utility to, music copyright.

## I. BACKGROUND: A PRIMER ON LITIGATION FINANCE

### A. A Brief History

Concerns about high litigation costs are nothing new. Take, for example, "talking-machine" phonograph manufacturers who argued that what would eventually become the 1909 Copyright Act would unconstitutionally "plunge[]" them "into . . . long and expensive litigation as would necessarily ensue if this bill becomes a law."<sup>17</sup> Or take publishers who conversely argued that "[n]o single [musical] publisher" could afford "to carry on such an expensive litigation, because these music publishers are not the millionaires that our friends on the other side have attempted to point out and show," and further that "no single composer would be able to supply the funds to carry on such a litigation."<sup>18</sup> And not only do concerns about parties' financial positions as expositors of judicial success track the inception of federal copyright protection in the United States, they also track the common law development of litigation in Western nations generally.<sup>19</sup> In sum, concerns about the cost of litigation are a time-honored tradition in the Western legal system.

The concept of third-party financiers as champions of the less-resourced is not novel either. In fact, the ancient common law doctrines of maintenance, champerty, and barratry were all developed in medieval England to regulate wealthy persons who funded others' land-dispute claims in exchange for a share of the land they received at final judgment.<sup>20</sup>

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<sup>17</sup> *Arguments Before the Comm. on Patents of the H.R., Conjointly with the S. Comm. on Patents, on H.R. 19853, To Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 157 (1906) (statement of Paul H. Cromelin, Vice President, Columbia Phonograph Co.).

<sup>18</sup> *See id.* at 203 (statement of Nathan Burkan, esq.) (discussing how expensive litigation is for poor composers).

<sup>19</sup> *See* M.J. Russell, *Trial by Battle and the Appeals of Felony*, 1 J. LEGAL HIST. 135, 145 (1980) (noting that "hired champions"—mercenaries hired to fight in place of criminal defendants in trials by battle—were prohibited because they would tie the outcome of trials by battle on the parties' relative financial positions instead of on divine adjudication of guilt or innocence).

<sup>20</sup> Michael Elliott, Note, *Trial by Social-Media: The Rise of Litigation Crowdfunding*, 84 U. CIN. L. REV. 529, 541 (2016).

However, the modern form of litigation finance developed much more recently. The model was likely pioneered in Australia in the 1990s.<sup>21</sup> Owing largely to Australia's legal and ethical framework, which was more favorable to the model than those of other nations, litigation finance steadily gained in popularity there in subsequent years.<sup>22</sup> Since then, litigation finance has spread unevenly to other countries,<sup>23</sup> but has gained traction in many European nations like England and Germany.<sup>24</sup>

In the United States, litigation finance was probably introduced by Las Vegas businessman (and felon) Perry Walton, the "self-proclaimed father of the modern litigation finance industry."<sup>25</sup> Thereafter, the model steadily increased in prominence and prevalence, aided by the parallel collapse of antiquated common law champerty doctrines and the like in many jurisdictions.<sup>26</sup> That steady growth grew into a "boom" in the 2010s, with empirical studies suggesting that litigation finance firms have appeared and granted money during those years at levels exceeding those in previous decades by orders of magnitude.<sup>27</sup> Today, the model continues to grow by embracing new sources of capital, including the increasingly pervasive populist-financing model known as "crowdsourcing."<sup>28</sup>

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<sup>21</sup> Geoffrey J. Lysaught & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. ECON. & POL'Y 645, 648 (2012).

<sup>22</sup> See *id.* at 648–49 (explaining the ways in which Australia's legal system promoted litigation finance and litigation finance's corresponding popularity increase there).

<sup>23</sup> See *id.* at 649 (canvassing the development of litigation finance in Australia and its mixed reception in civil-law countries).

<sup>24</sup> See Barker, *supra* note 11, at 522 ("The UK and certainly continental Europe can be considered more grown up about funding of large commercial disputes than the US. Germany, Europe's largest economy, has enjoyed an active and mature funding market for more than 10 years, which makes it—together with Australia—one of the world's early movers in this respect.").

<sup>25</sup> Rodak, *supra* note 5, at 505.

<sup>26</sup> See *id.* (citing Adam Liptak, *Lenders to Those Who Sue Are Challenged on Rates: In Ohio Case, Court Says Fees Are Too High*, N.Y. TIMES, May 19, 2003, at A15); Liptak, *supra*, at A15 ("[A]n erosion of the prohibition on investing in others' lawsuits, or champerty, has helped create the industry.").

<sup>27</sup> See Krause, *supra* note 14 ("In May [2016], Burford Capital released results of an online survey showing 28 percent of responding private practice lawyers say their firms have used litigation financing, as compared to the 7 percent reported in 2013.").

<sup>28</sup> See generally Elliott, *supra* note 20; Brian Willis, *Crowdfunding Solar: Access to Populist Capital*, TIGERCOMM: SCALINGGREEN (Jan. 29, 2013), <http://scalinggreen.tigercomm.us/2013/01/crowdfunding-solar-access-to-populous-capital> ("Crowdfunding is populism's answer to the bank . . .").

### *B. Justifications for Litigation Finance*

Proponents have advanced many arguments to justify litigation finance, and this Note does not attempt to review them all. However, it is possible to sample the model's principal advantages, grouped by three distinct justifications.

The first and most widely argued is that litigation finance opens courtroom doors for parties with limited financial means.<sup>29</sup> Absent third-party financing, parties who cannot afford to sustain litigation while waiting for their prospective settlement or award do not have the means to bring a suit. That contingency fees exist to combat this problem does not undermine this argument, proponents assert, because litigation financing is a far more flexible and widely available option.<sup>30</sup>

Second, proponents argue that litigation finance enables assistance beyond the forwarding of costs to those who cannot afford to raise or defend against a claim. For example, some point out that many litigation financiers also advance related funds like living expenses for tort victims deprived of job income during extended court battles.<sup>31</sup> Others point to the

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<sup>29</sup> See, e.g., Martin, *supra* note 12, at 77 (“Litigation financing firms provide an option to plaintiffs with good cases but with meager or no financial resources.”).

<sup>30</sup> Professors David S. Abrams and Daniel L. Chen provide an excellent overview of the key differences between litigation financing and traditional contingency fees in David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1079 (2013). They summarize those differences as follows:

The most prominent difference is that the potential funder in the contingency fee system must be an attorney. This can lead to some less desirable outcomes relative to litigation trading. For example, limiting potential funders to attorneys necessarily restricts the liquidity of the market for litigation, meaning that some positive expectation claims still may not be pursued because of an inability to find financing. It also may skew the claims that do get funded in favor of those that fit the risk profile of litigators. Many contingency-fee attorneys are unlikely to work on cases that have a low chance of success, even if the expected value is high. The contingency fee system also ends up imposing a large cost on clients, usually in the range of thirty percent—an amount that could be substantially decreased in a more competitive market for funding.

*Id.* (footnotes omitted).

<sup>31</sup> See Max Volsky, *A Brief Introduction to Litigation Finance*, LEXSHARES 2 (2016), [https://www.lexshares.com/Legal\\_Finance\\_Summary\\_Volsky.pdf](https://www.lexshares.com/Legal_Finance_Summary_Volsky.pdf) (“The first [type of litigation financing agreement offered by LexShares] is the lawsuit advance for tort claims, which provides funding to individual plaintiffs for living expenses during protracted litigation.”).

fact that litigation financing allows less-resourced parties to hire more expensive and competent legal counsel.<sup>32</sup>

Finally, and most saliently, proponents argue that in regimes similar to American copyright, third-party financing serves an important function by allowing less-resourced litigants to overcome cost barriers to using the law as it was actually intended: to deter violators and protect the important interests of legal rights holders.<sup>33</sup> In other words, where a legal system largely depends upon litigation to validate rights but that litigation is prohibitively expensive, access to cash is essential to the system's operation.<sup>34</sup> Proponents therefore assert that, by ensuring that access, litigation finance plays an important equalizing role.<sup>35</sup>

### *C. Problems with Litigation Finance*

Litigation finance has its warts, however. Three are particularly noteworthy. First is the specter of undue case influence. Many commentators—including members of Congress—have expressed concern that financiers pose serious risks to parties' decision-making and control of their cases.<sup>36</sup> They contend that, regardless of financiers' attestations to the

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<sup>32</sup> *E.g.*, Radek Goral, *Skin in the Game: Why Business Lawsuits Get Third-Party Funded*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 247, 247 (2015).

<sup>33</sup> Professor Syamkrishna Balganesh applies this argument specifically to the copyright realm:

When individuals know that the costs of litigation make it unlikely that suits will be brought, the law's ability to deter behavior begins to diminish in large measure. If litigation costs can influence a regime's ability to *deter* behavior, they must in equal measure be able to influence a regime's ability to *incentivize* behavior as well. And if copyright's primary purpose lies in providing creators with an incentive to create—as courts and policymakers routinely reiterate—then rising litigation costs will, in a similar vein, impede the system's realization of its core objective. Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2290 (2013) (footnote omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2291.

<sup>36</sup> See Sara Randazzo, *Lawmakers Taking Closer Look at Litigation Funding*, WALL ST. J.: L. BLOG (Aug. 27, 2015 4:22 PM), <http://blogs.wsj.com/law/2015/08/27/senators-call-for-transparency-in-litigation-funding> (“While proponents of the “litigation finance” industry say it helps level the playing field for those who would otherwise be unable to pursue lawsuits, critics have long complained that such third-party investors give outsiders undue influence over legal decisions and allow frivolous lawsuits to go forward, driving up the overall cost of litigation.”); Letter from Sen. Charles E. Grassley, Chairman, U.S. Senate Judiciary Comm., & Sen. John Cornyn, Chairman, Subcomm. on the Constitution, to Sir Peter Middleton, Chairman, Burford Capital 12 (Aug. 27, 2015), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-08-27%20CEG%2C%20Cornyn%20to>

contrary, third parties whose financial success is directly tied to a case's success are unavoidably more likely to meddle with the case's management.<sup>37</sup>

Second, critics argue that litigation finance encourages frivolous litigation.<sup>38</sup> This encouragement, they argue, stems from the fact that third-party-funded claims do not benefit from the self-interested gatekeeping that attorneys working on contingency bases perform.<sup>39</sup> In other words, purely out of economic self-interest, attorneys who front their own money to their clients are less likely to agree to pursue meritless cases.

Finally, critics argue that litigation finance has a distortionary effect on the settlement process. They assert that the practice improperly influences settlement decisions by encouraging parties to eschew meritorious settlement offers in favor of pushing cases through to final judgment, even when settlement would otherwise be the most mutually beneficial option. As they see it, “[a] plaintiff who must pay a finance company out of the proceeds of any recovery can be expected to reject what may otherwise be a fair settlement offer and hold out for a larger sum of money.”<sup>40</sup>

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%20Burford%20Capital%20%28Commerical%20Litigation%20Funding%29.pdf (“[W]hile commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.”).

<sup>37</sup> JOHN BEISNER, JESSICA MILLER & GARY RUBIN, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES*, U.S. CHAMBER INST. FOR LEGAL REFORM 7 (2009), <http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf> (“[L]itigation-financing arrangements undercut the plaintiff’s control over his or her own claim because investors inherently desire to protect their investment and will therefore seek to exert control over strategic decisions in the lawsuit.”).

<sup>38</sup> Joanna M. Shepherd, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 950 (2015).

<sup>39</sup> See BEISNER ET AL., *supra* note 37, at 5 (“What is more, third-party financing particularly increases the volume of questionable claims. This is because, absent such financing, attorneys have two incentives not to permit their clients to bring such claims. First, they have a duty to advise clients when potential claims would be frivolous. And second, when lawyers are working on contingency, they obviously would rather spend their finite time on cases that are likely to be successful, as opposed to cases with a low probability of success. Accordingly, absent third-party funding, cases that plaintiffs and their attorneys actually decide to file ordinarily can be expected to be of higher merit than cases that plaintiffs and their attorneys decide not to file. When third-party litigation financing increases the overall volume of litigation, however, those weak cases that plaintiffs and their attorneys ordinarily would not have pursued are much more likely to be filed.”).

<sup>40</sup> *Id.* at 6.

This concern has been borne out in at least one case, *Rancman v. Interim Settlement Funding Corp.*,<sup>41</sup> where the Supreme Court of Ohio held that litigation financing constituted champerty and maintenance under Ohio law because it “provided Rancman with a disincentive to settle her case.”<sup>42</sup> In reaching its decision, the court observed that Rancman’s finance agreement with her litigation funder created “an absolute disincentive to settle” her case for less than \$24,000 “because she would keep the \$6,000 advance” afforded her by their agreement, but “would not receive any additional money from a \$24,000 settlement.”<sup>43</sup> Thus, her only prospects for recovering more than the advance she received would be to win a judgment in excess of \$24,000, while at the same time the guaranteed advance she already received ensured that she risked no financial loss by rejecting the otherwise fair settlement in favor of pursuing a heavier verdict.<sup>44</sup>

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In sum, litigation finance presents both tantalizing litigation-equalizing benefits and disturbing policy concerns. In the next Part, this Note returns to these justifications and concerns to illustrate that litigation finance can be used for particularly meritorious ends in the realm of music copyright law.

## II. LITIGATION FINANCE AND MUSIC COPYRIGHT

### A. *Copyright’s Precedent Problem*

Copyright (and music copyright, by incorporation) has a precedent problem. Legal standards ranging from fair use,<sup>45</sup> to the *de minimis* defense<sup>46</sup> in music sampling, to the degree of service-provider knowledge

<sup>41</sup> *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003).

<sup>42</sup> *Id.* at 220.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Compare Cariou v. Prince*, 714 F.3d 694, 705–06 (2d Cir. 2013) (“Transformative works lie at the heart of the fair use doctrine’s guarantee of breathing space.” (alterations omitted) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))), *with Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), *cert. denied*, 191 L. Ed. 2d 638 (2015) (“To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no [sic] explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2). We think it best to stick with the statutory list . . .”).

<sup>46</sup> *Compare VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016) (“We hold that the ‘de minimis’ exception applies to infringement actions

necessary to survive summary judgment in digital-content-infringement cases<sup>47</sup> are inconsistent across the country, despite the fact that Congress sought to create a harmonious nationwide scheme when it passed a federal statute governing copyright.<sup>48</sup>

Sampling of sound recordings is a prime example of how this unsettled legal state impacts the music industry. Although the practice of borrowing portions of others' works is certainly nothing new,<sup>49</sup> creative experimentation with sampling heated up dramatically in the 1980s and 1990s when technology began to make it easier and cheaper to directly reproduce and manipulate sound recordings.<sup>50</sup> Indeed, entire genres have since evolved around the art of creative sampling.<sup>51</sup>

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concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.”), *with* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample.”).

<sup>47</sup> *Compare* *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 97 (2d Cir. 2016) (holding that the fact that infringing works were being played on service-provider platforms even where “copyrighted music . . . was to some extent viewed (or even viewed in its entirety) by some employee of a service provider” was not sufficient to prove the actual or “red flag knowledge” necessary to invoke an exception to the DMCA’s service-provider safe harbor), *with* *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) (“The material in question was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material solicited and assisted was both copyrighted and not licensed to random members of the public, and that the induced use was therefore infringing.”).

<sup>48</sup> *See* U.S. COPYRIGHT OFFICE, FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 121 (2011), <http://www.copyright.gov/docs/sound/pre-72-report.pdf> (“National uniformity of copyright law ensures that all users, consumers, intermediaries, and right holders are operating under a single, consistent set of laws.”).

<sup>49</sup> *See, e.g.*, *Computer Music, A Brief History of Sampling*, MUSICRADAR (Aug. 5, 2014), <http://www.musicradar.com/tuition/tech/a-brief-history-of-sampling-604868> (noting that “digital sampling has been in existence since the 1960s”); Pádraic Grant, *Mainstream Sampling—Innovation & Scorn*, PERFECT SOUND FOREVER (Oct. 2007), <http://www.furious.com/perfect/sampling.html> (observing that the early twentieth-century classical genre known as “[m]usique concrete is perhaps the most useful as a starting point in the history of sampling” because it “was rooted in attempts at new forms of classical composition” that relied largely on “the utilisation and reinterpretation of existing material to create original works of art”).

<sup>50</sup> *See* *Computer Music*, *supra* note 49 (“Thanks to digital technology’s decreasing manufacturing costs, the first relatively cheap samplers began to appear in the mid-to-late ’80s.”).

<sup>51</sup> *See id.* (noting that hardcore rave “couldn’t have existed before the advent of the sampler”); Grant, *supra* note 49 (documenting how sampling was instrumental to

But with those technological and creative advances came lawsuits. Those lawsuits revealed an uncertain interaction between copyright law and sampling of sound recordings. Cases involving the *de minimis* defense<sup>52</sup> are illustrative. The question arising in those cases is whether the *de minimis* defense is available at all in sampling cases. The primary source of this disagreement arises from the language in 17 U.S.C. § 114, which states that sound recording rights “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds.”<sup>53</sup> The Sixth Circuit concluded that under a literal approach to that text, the word “entirely” suggests that artists cannot sample *any* portion of another’s work, regardless of how small that sample may be.<sup>54</sup> In contrast, the Ninth Circuit concluded that under either approach—but particularly a purposive approach—that the passage was clearly intended as a rights-*limiting* provision suggests that the provision should not be read to substantially *expand* rights.<sup>55</sup> Additionally, nothing in the language indicates an intention to abandon the *de minimis* exception solely with respect to sound recordings when it consistently applies throughout copyright law writ large.<sup>56</sup>

There are also policy disagreements. Proponents of the defense maintain that sampling cases are no different than any other claims, and that the *de minimis* defense should therefore apply.<sup>57</sup> In contrast, critics of the defense argue that sampling is more akin to physical theft because it involves brazenly using portions of others’ songs.<sup>58</sup> Regardless of how these arguments should be resolved, the dispute demonstrates that the 1976 Copyright Act’s text is unclear on the topic of sampling of sound

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hip hop’s development, and noting that sampling was “a basis for some of the most interesting and revered music of its time”).

<sup>52</sup> The *de minimis* defense allows an alleged infringer to assert that the portions they copied from others’ works were too small or inconsequential to amount to copyright infringement. *See Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (“For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.”).

<sup>53</sup> 17 U.S.C. § 114(b) (2012) (emphasis added).

<sup>54</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

<sup>55</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881–83 (9th Cir. 2016).

<sup>56</sup> *Id.* at 882.

<sup>57</sup> *See, e.g., id.* (“[N]othing in [the 1976 Copyright Act] suggests differential treatment of *de minimis* copying of sound recordings compared to, say, sculptures.”).

<sup>58</sup> *See, e.g., Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183, 185 (S.D.N.Y. 1991) (equating sampling to a violation of Moses’s Seventh Commandment, characterizing the practice as a “callous disregard for the law and for the rights of others,” and referring case to the U.S. Attorney to consider federal criminal prosecution).

recordings. This is unsurprising considering that the practice was virtually unheard of at the time the law was passed.<sup>59</sup>

Unsurprisingly, the circuits have not resolved this issue in a uniform manner. The Sixth Circuit was the first to address the issue and held in *Bridgeport Music, Inc. v. Dimension Films*<sup>60</sup> that the *de minimis* defense is practically unavailable in sampling cases.<sup>61</sup> Despite garnering volumes of scholarly and industry criticism,<sup>62</sup> *Bridgeport* stood alone among circuit-court decisions on the *de minimis* question for a decade thereafter.

Furthermore, and perhaps even more confusing to the industry, precedential development is excruciatingly slow in the circuit courts. Sampling is again instructive. After the Sixth Circuit's controversial denial of the *de minimis* defense in *Bridgeport*, no circuit addressed the issue for over a decade. Finally, in 2016, the Ninth Circuit created (yet another) circuit split in copyright by holding in *VMG Salsoul v. Ciccone*<sup>63</sup> that the *de minimis* defense is in fact available in sampling cases.<sup>64</sup> This decision—though likely textually and logically correct—thus creates even more uncertainty throughout the nation over what constitutes music copyright infringement. As one commentator sarcastically exclaimed, “Let the forum shopping for music sampling copyright infringement claims and declaratory judgment actions begin!”<sup>65</sup>

In sum, while rapid technological progress has changed the ways in which artists create music and their fans listen to and buy that music, the contemporary state of music copyright law remains unsettled in important and perhaps even market-defining ways. Simply put, the courts have not kept up.

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<sup>59</sup> See Computer Music, *supra* note 49 and accompanying text.

<sup>60</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>61</sup> *Id.* at 801.

<sup>62</sup> See generally, e.g., John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209 (2005) (positing numerous ways in which *Bridgeport* represents “a problematic and potentially harmful decision”).

<sup>63</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

<sup>64</sup> *Id.* at 874.

<sup>65</sup> Mark H. Wittow & Eliza Hall, *Sometimes Borrowing Isn't Stealing: De Minimis Sampling of Music Sound Recordings Isn't Copyright Infringement, Say Two Key Courts in the United States and Germany*, K&L GATES (June 16, 2016), <http://www.klgates.com/sometimes-borrowing-isnt-stealing-de-minimis-sampling-of-music-sound-recordings-isnt-copyright-infringement-say-two-key-courts-in-the-united-states-and-germany-06-16-2016>.

### *B. How Litigation Costs Distort Music Copyright Law*

Although many factors prevent the law from keeping up with technological and market changes in the music industry, high litigation costs are chief among them. When parties almost always settle, courts have almost no opportunity to make precedent. Because precedent makes the law more predictable for industry players, extremely frequent settlement distorts the law by feeding perpetual unpredictability.

That is exactly what is happening in music copyright law. Copyright cases are even more expensive than other types of already expensive civil cases, averaging greater than three times the cost of an average civil suit.<sup>66</sup> In fact, the music industry has developed a series of risk-averse, prophylactic practices to avoid expensive litigation at all costs.<sup>67</sup> These practices include “[n]eedless licenses, clearances, and permissions—which are expensive, but cost less than litigation.”<sup>68</sup> Shyamkrishna Balganesh asserts that these practices are “the norm among users and copiers, even when wholly unnecessary as a legal matter, and they are often motivated entirely by the impulse to avoid costly litigation.”<sup>69</sup> Further, defendants settle the vast majority of music copyright claims much earlier in the litigation process, largely to curb the cost of going to trial.<sup>70</sup> Charles Cronin recently explained that “[m]usic infringement claims tend to be settled early on, with financially successful defendants doling out basically extorted payoffs to potential plaintiffs rather than facing expensive, protracted and embarrassing litigation.”<sup>71</sup> But high costs do not just alter the behavior of music copyright defendants. They are just as likely to influence the litigation strategy of prospective plaintiffs. In fact, citing empirical studies, Balganesh asserts that “[l]itigating a copyright claim is no longer an affordable prospect for a vast majority of authors and

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<sup>66</sup> AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY 2011, at 35 (2011).

<sup>67</sup> Balganesh, *supra* note 33, at 2280.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* (“On the defendant side, users and copiers of creative works are, for identical reasons, all too reluctant to defend themselves in court when threatened with an infringement lawsuit, and go to extreme lengths to avoid the risk of being sued, even when their actions are fully defensible under copyright’s fair use doctrine.” (footnote omitted)).

<sup>71</sup> Ben Sisario & Noah Smith, ‘Blurred Lines’ Infringed on Marvin Gaye Copyright, *Jury Rules*, N.Y. TIMES (Mar. 10, 2015), <http://www.nytimes.com/2015/03/11/business/media/blurred-lines-infringed-on-marvin-gaye-copyright-jury-rules.html> (quoting Mr. Cronin).

creators.”<sup>72</sup> Thus, it is entirely reasonable to assume that many copyright holders choose, as a matter of pure economic necessity, to forego suing known infringers and thus leave violation of their legal rights unmitigated.<sup>73</sup>

More concerning, high copyright litigation costs—and the litigant behavior they coerce—generate far more insidious externalities: they are problematic for music copyright (and copyright law writ large) because they “have a distortionary effect on copyright law and policy.”<sup>74</sup> In particular, they undermine copyright law’s central purpose to “promote the progress of the arts and sciences” in two ways. First, they erode copyright owners’ faith in the legal system’s ability to vindicate the hard-won fruits of their creative labors.<sup>75</sup> Second, they undermine defendants’ access to “safety valves—such as the fair use doctrine and other limitations and exceptions to exclusive rights”—by forcing defendants to adopt “litigation-avoidance strategies” and thereby abandon those defenses long before they are ripe for “judicial determination.”<sup>76</sup>

This cocktail of lost plaintiff faith in copyright law and defendant litigation avoidance at nearly any cost has caused, or at least contributed to, the disturbingly unsettled state of many aspects of music copyright law. They have done so by jointly breeding a circular system: prospective plaintiffs with limited financial backing are, by way of cash shortage and cloudy prospects of success, doubly dissuaded from bringing suits or fighting suits brought against them all the way to completion. Further, well-heeled litigants can perpetuate this system by strategically negotiating pre-trial settlements to avoid undesired precedent and further pursuing only those cases that are economically advantageous or stand to benefit their

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<sup>72</sup> See Balganes, *supra* note 33, at 2280 (“Litigating a copyright claim is no longer an affordable prospect for a vast majority of authors and creators. As of 2011, the average cost of litigating a copyright infringement case through trial, for either plaintiff or defendant—excluding judgment and awards—was estimated to range from \$384,000 to a staggering \$2 million. To individual, small business, or non-commercial creators, all of who are intended beneficiaries of copyright, copyright litigation remains an unaffordable proposition.” (footnote omitted)).

<sup>73</sup> Cf. Lee Wilson, *If You Want To Sue for Copyright Infringement*, GRAPHIC ARTISTS GUILD, [https://graphicartistsguild.org/tools\\_resources/if-you-want-to-sue](https://graphicartistsguild.org/tools_resources/if-you-want-to-sue) (last visited Dec. 3, 2016) (“People who believe that their copyrights have been infringed often have no idea how complicated copyright infringement lawsuits are. This doesn’t mean that there are no issues worth going to court over—litigation is sometimes the only way to settle some disputes or to pursue that elusive goal, justice. However, the U. S. judicial system is so complex that a lawsuit can leave you as bloodied as a fistfight; even if you win you are bruised by the experience.”).

<sup>74</sup> Balganes, *supra* note 33, at 2280.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2280–81.

positions.<sup>77</sup> In either circumstance, the onus undeniably falls on settlement, rather than on developing precedent. Given these realities, it should come as no surprise that the number of copyright lawsuits in America has consistently and dramatically fallen in recent years.<sup>78</sup> Therefore, legal risk and uncertainty have ensued in force. Litigants who do brave the treacherous, unexplored waters of music copyright litigation by taking their cases all the way to trial must truly sail into the unknown with little sense of their prospects for winning it all or losing their shirts.<sup>79</sup>

### III. HOW LITIGATION FINANCE CAN HELP

#### A. *Rent Seeking, Precedent, and Purposeful Ambiguity*

Critics argue that litigation finance incentivizes litigants to reject what would normally be attractive settlements in favor of pursuing riskier but potentially more lucrative trial judgments.<sup>80</sup> This externality, they argue, is not good for the courts and the justice system because more cases take up courts' and parties' time and further clog up already-sclerotic dockets.<sup>81</sup> They contend that, coupled with its tendency to promote frivolous or at least less-than-meritorious lawsuits, litigation finance allows parties to exploit the judicial system for their own benefit while imposing harms on the rest of the system.<sup>82</sup>

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<sup>77</sup> See Casey Rae, *Blurred (Legal) Lines?*, FUTURE OF MUSIC COALITION (Mar. 11, 2015, 3:35 P.M.), <https://futureofmusic.org/blog/2015/03/11/blurred-legal-lines> (“One thing that doesn’t get pointed out often enough in coverage of these high-profile [music copyright] cases is that infringement lawsuits seem to be mostly available options to those with deep enough pockets to bring a legal action. We’ve encountered a number of creators who don’t have the means to protect their works in the courts due to the high costs of litigation, despite much more clear-cut examples of infringement. This is something that needs to be discussed.”).

<sup>78</sup> See Balganes, *supra* note 33, at 2288–89 (“These costs have risen dramatically over the last decade, which has in turn seen a corresponding reduction in the number of copyright claims that are actually litigated in court. In 2005, a total of 5,796 new copyright cases were filed. This figure has seen a steady decline since, and by 2011 this figure shrank to 2,297—an astounding sixty percent drop. The Copyright Office attributes most of this to the rise in litigation costs . . . .” (footnotes omitted)).

<sup>79</sup> See Rae, *supra* note 77 (“When [music copyright] cases . . . go to jury, things can get very interesting and the outcomes are often unpredictable.”).

<sup>80</sup> *E.g.*, BEISNER ET AL., *supra* note 37, at 6.

<sup>81</sup> *Id.* at 4.

<sup>82</sup> See *id.* (“Proponents of third-party litigation financing argue that the practice promotes access to justice. But this focus on access to justice ignores an obvious point—third-party litigation funding increases a plaintiff’s access to the courts, not justice. . . . Practices like third-party funding increase the overall litigation volume,

Thus, they argue that litigation finance actually fosters an illicit form of judicial “rent seeking,” a form of path manipulation<sup>83</sup> whereby an actor seeks to benefit his position through strategic participation in a political or legal system.<sup>84</sup>

But frequent settlement creates externalities too. By design, the American legal system heavily depends on courts to develop precedent when applying broad statutes to discrete facts.<sup>85</sup> In doing so, courts clean up messy drafting or unavoidable lingual inexactitude and keep statutes current by applying the principles of justice embodied within them to unforeseeable new scenarios wrought by technological or behavioral developments.<sup>86</sup> Furthermore, precedent is important not just to litigants, but to markets. That is because precedent begets legal clarity. When the law is sufficiently clear and detailed, actors know when their behavior crosses legal boundaries.<sup>87</sup> Economic legal regimes like copyright law are designed to govern business conduct; thus, when the law governing their transactions is sufficiently clear and detailed, businesses and market participants can contract, create, and sell without fear of legal retribution.<sup>88</sup>

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including the number of non-meritorious cases filed, and thus effectively reduce (not increase) the level of justice in the litigation system.”).

<sup>83</sup> See Jeremy Kidd, *To Fund or Not To Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL’Y 613, 613 (2012) (discussing “the danger of path manipulation, a form of judicial rent-seeking” and explaining that “[i]n a system of binding precedent, litigation financiers will be faced with incentives to use case selection to maximize profits by pressuring the courts to open new areas of tort liability”).

<sup>84</sup> David R. Henderson, *Rent Seeking*, THE CONCISE ENCYCLOPEDIA ECON. (2008), <http://www.econlib.org/library/Enc/RentSeeking.html>.

<sup>85</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

<sup>86</sup> See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 36 (2011) (“Precedent is the cornerstone of common law method, the conceptual vehicle allowing law and justice to merge as one.”); Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 273 (2007) (“Courts and legislatures have altered common law precedents in the past when new developments, including technological advances, made following precedent impractical or undesirable.”).

<sup>87</sup> See Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 926 (2006) (“Precedent rules, when followed, settle controversy and enable individuals to coordinate their actions.”).

<sup>88</sup> Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 954–55 (2012) (“Stability functions in tandem with predictability. Adherence to precedent establishes a framework for efficient public and private planning.”).

But the system breaks down in a number of ways when settlement happens so often that it robs courts of flexibility to develop new precedent.<sup>89</sup> Chief among those is that precedent can have the opposite effect: when precedent across jurisdictions is so infrequent that circuit splits and ambiguous questions of law linger for years, every new circuit decision can generate years of confusion when, as in music copyright law, the Supreme Court is unable or unwilling to step in and settle the issue. The only parties that benefit from this are lawyers: forum shopping is inevitable.<sup>90</sup> Indeed, one need look no farther than the current split over the *de minimis* doctrine in digital sampling to see this effect in full force.<sup>91</sup> And, as has been demonstrated, while litigation finance might sometimes incentivize rejection of fair settlement offers, high litigation costs often incentivize acceptance of *unfair* settlement offers.<sup>92</sup>

In addition to creating those externalities, prohibitive litigation costs themselves promote an inequitable form of rent seeking. Specifically, they tend to preclude less-resourced market participants from using the judicial system to advance their interests.<sup>93</sup> What results is a system in which parties with pockets deep enough to survive protracted litigation can spend strategically to obtain the precedent (or lack thereof) they want. The current state of the music industry bears powerful witness to this: it is widely asserted that the litigation-avoidance regime built up around the unsettled nature of music copyright law strongly favors the largest and most well-established market participants.<sup>94</sup> As has been discussed, this regime is not so much the result of unfavorable precedent as it is perpetually unclear law.<sup>95</sup> But actors can seek rent by trying to perpetuate ambiguity just as much as they can by trying to obtain favorable precedent—especially when, as in music, perpetual ambiguity clearly favors one party over another. All of these factors dictate that we must have what we do have: despite an unprecedented revival in indie labels and niche genres driven by

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<sup>89</sup> See Neil W. Averitt, *The Elements of a Policy Statement on Section 5*, ANTITRUST SOURCE, Oct. 2013, at 3 (describing unpredictability concerns when “cases are too infrequent for precedents to accumulate rapidly enough”).

<sup>90</sup> Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1183 (2012).

<sup>91</sup> See *supra* notes 52–65 and accompanying text.

<sup>92</sup> See *supra* note 71 and accompanying text.

<sup>93</sup> See *supra* notes 72–73 and accompanying text.

<sup>94</sup> See, e.g., Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 TOURO L. REV. 375, 399 (2006) (arguing that the music industry’s “[s]tructure” preserves major-label “[m]onopoly [p]ower”).

<sup>95</sup> See *supra* notes 45–48 and accompanying text. Though, interestingly, denying a *de minimis* exception as the *Bridgeport* court did mostly benefitted large, old labels with the most extensive catalogs.

technology platforms like YouTube and Kickstarter that make it exponentially easier to reach consumers and vie for funding, the legal regime under which this revival is happening has not kept pace with this redistribution of market forces.

### B. Countering Conventional Criticisms

In light of these realities, musicians should do exactly what litigation-finance critics say they should not: use litigation finance to pressure courts to develop precedent that benefits their personal interests.<sup>96</sup> While attempting to manipulate judicial decision makers for personal gain might seem deeply repugnant to notions of fairness at first glance, it is important to remember that the common law system of incremental adjudication is designed to accommodate—and indeed depends upon—strong adversarial representation by self-interested parties.<sup>97</sup> But when, as in music copyright law, litigation costs prohibit less-resourced parties from effectively aggregating their views across multiple cases and in multiple courts (both as plaintiffs and defendants), the system is volumetrically starved of that adverseness. Conversely, litigation finance can mitigate this problem by providing the financial means for less-resourced parties to increase the number of cases they can afford to bring or defend, thereby strengthening their adversarial advocacy in the judicial system. And this argument is not entirely abstract: one empirical study in Australia found that the model demonstrably increased the development of precedent in courts allowing litigation finance.<sup>98</sup>

Further, at least two additional considerations weigh in favor of viewing this as a benefit instead of a drawback, at least with respect to music copyright. First, strategic litigation of the type contemplated here is

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<sup>96</sup> See Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 *LOY. U. CHI. L.J.* 1239, 1268–69 (2016) (“Rent-seeking can also occur . . . through case selection. Each individual who is involved in a lawsuit will, of course, prefer a particular outcome. To the extent that people use the judicial branch to pursue personal goals, then, a very soft form of rent-seeking occurs in nearly every case and may actually be an integral part of our adversarial system.”).

<sup>97</sup> See *id.* at 1269 (“As an inherently evolutionary system, the common law seems designed to adapt according to judicial rent-seeking pressures, both benign and nefarious. The adaptability of the common law is the foundation for the ‘efficiency of the common law’ hypothesis.” (quoting Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. LEGAL STUD.* 65 (1977))).

<sup>98</sup> See Abrams & Chen, *supra* note 30, at 1107 (“Litigation funding does appear to have precedential value. By two different measures, cases funded by IMF have greater importance than those they did not fund, but which proceeded to trial in any case. Funded cases both cite and receive over twice as many references as unfunded cases. If citations are a good proxy for legal precedent, then third-party funding appears to promote its more rapid development.”).

not rent seeking in the same sense as the deleterious conduct the term usually describes. Traditional critiques of rent seeking focus on ethically questionable forms of special-interest advocacy like lobbying.<sup>99</sup> But litigation finance does not incentivize this type of rent seeking. Rather, because prohibitive litigation costs breed one-sided<sup>100</sup> rent seeking by blocking judicial access to less-resourced parties<sup>101</sup>—which is much more akin to the traditionally derided types of rent seeking mentioned above—litigation finance incentivizes efforts to nudge legal precedent back toward equilibrium with respect to adversarial parity. In other words, by opening courtroom doors to less-resourced musicians and labels (and leaving them open long enough for those parties to obtain judicial decisions in lieu of settlements), litigation finance could allow them to bend the arc of precedent toward neutral legal principles by strengthening the adverseness of viewpoints in music copyright lawsuits throughout the nation. And this adverseness does not just produce one-sided benefits: it is well-established that judicial systems demonstrably benefit from robust and thorough debate.<sup>102</sup>

Second, the copyright regime itself refutes arguments that increased litigation is bad for the courts and the justice system. As Balganesch points out, unlike in other regimes, copyright law largely *depends* on litigation to validate rights.<sup>103</sup> Thus, it is no exaggeration to say that prohibitive litigation costs fundamentally distort the way that music copyright law is

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<sup>99</sup> See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 197 (2012) (“Lobbyists threaten national economic welfare in two ways. First, lobbyists facilitate activity which economists term rent-seeking. One common form of rent-seeking occurs when individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits. Second, lobbyists tend to lobby for legislation that is itself an inefficient use of government resources, such as funding the building of a ‘bridge to nowhere.’”).

<sup>100</sup> See Kidd, *supra* note 96, at 1274 (“Litigants will also be more likely to engage in rent-seeking, and those efforts are more likely to be successful, if strategic choices are unopposed outside of the individual cases.”).

<sup>101</sup> See *supra* notes 72–73 and accompanying text.

<sup>102</sup> See, e.g., *Franklin Prop. Tr. v. Foresite, Inc.*, 438 A.2d 218, 220–21 (Me. 1981) (noting that “concrete adverseness” is “crucial to the illumination of legal issues and the proper exercise of judicial power”).

<sup>103</sup> See Balganesch, *supra* note 33, at 2286–87 (discussing why “[c]opyright law’s basic entitlement structure anticipates and operates in the shadow of private litigation” and observing that “the copyright entitlement is formally determined for the first time only during litigation” meaning that “[l]itigation thus performs more than just a remedial function in copyright law—i.e., merely correcting a harm—but instead also performs an important *constitutive* function for the entitlement” (emphasis added)).

supposed to work. Here, it is worthwhile to point out concerns over judicial economy. It is certainly true that more litigation clogs up dockets, but in light of the need to resort to legal action to vindicate rights, the current copyright regime is premised upon a high level of judicial involvement.<sup>104</sup> Hence, concerns over judicial economy cannot rightly be used to discourage an access tool like litigation finance that opens doors to the only tribunal capable of providing relief to aggrieved parties. Nevertheless, judicial-economy concerns certainly counsel in favor of structural reform of the current copyright system to make it more accessible and affordable.<sup>105</sup>

Now, this argument holds true only if litigation finance enables and promotes an increase in the number of *legitimate* lawsuits. Frivolous lawsuits are indeed a form of undesirable rent seeking because they waste everyone's time and money, including that of the courts and defendants.<sup>106</sup> If allowed to continue too far, they could also coerce defendants into settling in cases in which they are faultless. They also encourage litigation-avoidance strategies like those that have already constricted artistic creation in the music industry.<sup>107</sup>

But common sense counters the argument that litigation finance substantially promotes frivolous litigation. It would make no sense for litigation financiers to fund bogus lawsuits.<sup>108</sup> It stands to reason that a litigation finance firm facing the all-or-nothing, "go big or go home" economic proposition associated with a contingency agreement would take extra precautions to make sure that any funding application it approves has a realistic chance of succeeding. And by definition, a suit that has a realistic chance of succeeding is not frivolous. Not surprisingly, the need to carefully screen funding applications has led many firms to require applicants to have already

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<sup>104</sup> *Id.*

<sup>105</sup> See generally U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> (analyzing and advancing specific proposals for the creation of a small claims copyright tribunal to remove many copyright claims from federal court and make them more affordable).

<sup>106</sup> Kidd, *supra* note 83, at 628–29.

<sup>107</sup> See William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1889 n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that possibly could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively.").

<sup>108</sup> See Martin, *supra* note 12, at 77 ("No one is going to invest in a frivolous lawsuit because any money thus invested will be lost.").

retained lawyers—lawyers bound by ethical rules not to knowingly pursue frivolous lawsuits—to handle their claims at the time of application.<sup>109</sup> In fact, this has led at least two scholars, Michael Abramowicz and Omer Alper, to suggest that properly regulated litigation finance agreements can add a useful layer of additional gatekeeping on top of those functions contained within the formal judicial system<sup>110</sup> like motions to dismiss and sanctions.

### C. *Historical Analogies*

Finally, proper judicial rent seeking is nothing new. In fact, some of the key civil-rights developments of the last century resulted at least in part from strategic use of litigation to develop beneficial precedent. First, the NAACP's legendary civil-rights litigation strategies—pioneered by Thurgood Marshall—led to a number of landmark decisions, including *Brown v. Board of Education*, which held that school segregation violated the Equal Protection Clause.<sup>111</sup> Second and more recently, the LGBT-rights movement's nationwide litigation strategy—with the civil-rights legal organization Lambda Legal marching at the vanguard—culminated<sup>112</sup> in the cultural earthquake that was *Obergefell v. Hodges*,<sup>113</sup> in which the Supreme Court held that state prohibitions of same-sex marriage violated the Fourteenth Amendment.<sup>114</sup>

However, these historical analogies also demonstrate that a litigation strategy is necessary to effectively seek judicial rent. Unlike those movements, which were coordinated by strong, centralized leadership in the form of organized advocacy groups, litigation finance is a populist *means*,

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<sup>109</sup> See Terry Carter, *Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers*, A.B.A. J., Oct. 2004, at 34, 34 (quoting law professor Lester Brickman, who argues that litigation finance firms “come in after the lawyer, so [claims have] nothing to do with frivolous litigation”).

<sup>110</sup> See generally Michael Abramowicz & Omer Alper, *Screening Legal Claims Based on Third-Party Litigation Finance Agreements and Other Signals of Quality*, 66 VAND. L. REV. 1641 (2013) (“The advent of third-party litigation finance introduces a new gatekeeper to the legal process.”).

<sup>111</sup> See generally Alan Robert Burch, *Charles Hamilton Houston, The Texas White Primary, and Centralization of the NAACP's Litigation Strategy*, 21 T. MARSHALL L. REV. 95 (1995) (canvassing the development and pursuit of the NAACP's masterful litigation strategy).

<sup>112</sup> See Jon W. Davidson, *What Happened Today at the Supreme Court*, LAMBDA LEGAL BLOG (June 26, 2015), [http://www.lambdalegal.org/blog/20150626\\_victory-analysis](http://www.lambdalegal.org/blog/20150626_victory-analysis) (“Today's decision rests on the building blocks of prior LGBT rights victories and of other key civil rights precedents.”).

<sup>113</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>114</sup> *Id.* at 2608.

not a populist *movement*. In theory, litigation funding is available to anyone with a decent legal claim and the time and courage to pursue it. As a result, absent carefully coordinated action, prospective litigants could conceivably use third-party funding to harm their own interests by bringing the wrong cases in the wrong courts<sup>115</sup> or defending bad cases in lieu of settling just as much as they could to help them. Thus, market participants would be well-served to employ a coherent strategy of targeted planning instead of relying on individual participants to bring suits *sua sponte*.

In sum, while litigation finance can help less-resourced market participants seek rent, it cannot achieve this in a vacuum. Nevertheless, with a healthy dose of collective action and the right strategy, the model stands to play an important role in opening courtroom doors to, and shaping precedential development in favor of, those who were previously shut out by prohibitive transaction costs.

### CONCLUSION

Free markets do not capitulate easily. Despite the oppressive cost of vindicating one's legal rights, market participants shaped the music industry to maximize their ability to cope under the uncertainties and high costs of American copyright law. Yet because the big labels carried the most cash and exerted the most influence in times past, they became the primary architects of the litigation-avoidance regime.

While time has passed and technology has shifted the balance of power back towards less-resourced actors, the law has not caught up to new realities. But because litigation finance can advance the cash necessary to overcome the system's intrinsic cost barriers, those actors have the opportunity to demand their voices in the courtroom. With careful planning and a degree of coordination, they can use litigation finance as a vehicle to push for greater legal clarity and precedent that benefits their interests. And even if the precedent cuts against those interests, the system as a whole can only benefit from greater clarity. Hence, musicians and labels would be wise to consider a closer look at the ever-growing phenomenon known as litigation finance.

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<sup>115</sup> See Wyatt Fore, Note, *DeBoer v. Snyder: A Case Study in Litigation and Social Reform*, 22 MICH. J. GENDER & L. 169, 195 (2015) (noting the ACLU's concern over gay plaintiffs' anti-discrimination lawsuit because it "presented a chance of creating bad case law" and thereby undermined the ACLU's long-term litigation strategy); see also *Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting) (recalling the timeless adage that "bad facts make bad law").